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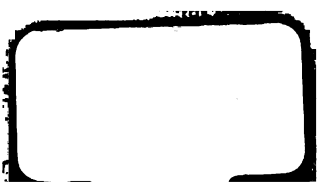

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PREPARED BY

JUDGES, MEMBERS OF THE BAR, TEACHERS IN LAW SCHOOLS, AND WRITERS ON LEGAL SUBJECTS

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Modern American Law

LAW OF NEGOTIABLE INSTRUMENTS

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LAW OF SURETYSHIP AND GUARANTY

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PREFACE.

The subjects treated in this volume, Negotiable Instruments, Suretyship and Guaranty, Mortgages, and Interpretation of Statutes, are closely related, especially in their practical application.

The common law rules dealing with the first three subjects have been altered and in some instances abolished by legislation. As a result thereof, there has been considerable confusion in a number of states. In their commentaries, therefore, the authors not only state the principles of the common law, but point out the statutory changes as well.

Professor William G. Hale, University of Illinois, is the author of the treatise, "Law of Negotiable Instruments." He explains fully the earlier rules of the law merchant and the provisions of the "Negotiable Instruments Act," which has been adopted in so many of the states.

The second commentary in the volume is on the "Law of Suretyship and Guaranty," by Professor Charles E. Carpenter of the University of North Dakota. Professor Carpenter clears away many of the difficulties which frequently arise in the study of this subject.

The third treatise, "Law of Mortgages—Real and Chattel," by Professor Manley O. Hudson, University of Missouri, contains a full explanation of the various theories upon which mortgages are based in the several jurisdictions.

On account of numerous legislative acts that affect the three branches of the law above referred to, it is especially appropriate to include in this volume the commentary on "Interpretation of Statutes" by Professor John R. Rood of the University of Michigan. This treatise clearly sets forth the rules of interpretation that have been adopted by the courts.

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LAW OF NEGOTIABLE INSTRUMENTS

BY

WILLIAM GREEN HALE, B.S., LL.B.*

CHAPTER I.

HISTORY AND GENERAL CHARACTERISTICS.

1. **Scope of the subject.**—Under the title of Negotiable Instruments the law pertaining to bills of exchange, checks (which are a special variety of bill of exchange) and negotiable promissory notes will be considered.

2. **History.**—The law governing negotiable instruments had its inception in the customs of the mercantile world—indeed these instruments were born of the necessities and needs of merchants. Bills, notes and checks are thus frequently referred to as commercial paper, or mercantile specialties, and the law pertaining to such instruments as the Law Merchant.

There is much doubt as to the exact time and place of the origin of commercial paper. This much seems quite certain, that bills of exchange were used to some extent by the merchants of Italy as early as the thirteenth century and, not a great while thereafter,

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found their way into England, where they were first used by the English merchants in their dealings with the merchants on the continent of Europe. Thus the foreign bill of exchange was the first mercantile specialty to become known to the English law.

The inland bill of exchange and promissory note followed rapidly in the wake of the foreign bill of exchange. And by the first of the seventeenth century all three of these instruments were well known to the merchants of England and were coming to be made the subject of litigation. It was about this time also, it is said, that the custom of making such instruments payable to order or bearer and thus negotiable in form, took its rise. Down to the time of Lord Mansfield, in 1756, however, the rules that governed in the controversies which arose over bills and notes were in a more or less chaotic condition. He it was—since termed the "father of the Law Merchant"—who voiced and moulded into the form of definite rules of law the numerous customs of the merchants with reference to such paper and made the law merchant a real part and parcel of the great body of the English law.[1]

3. **Bill of exchange defined.**—A bill of exchange is defined by Blackstone as "an open letter of request from one man to another, desiring him to pay a sum of money therein named to a third person on his account."[2] Incorporating the element of negotiability, it may be more fully defined as an unconditional order

[1] Goodwin v. Robarts, L. R. 10 Ex. 337 (Eng.), LEADING ILLUSTRATIVE CASES.

[2] 2 Blackstone, Commentaries, p. 466.

in writing addressed by one person to another, signed by the person issuing it, and requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to the order of some specified person or to bearer.

The one who issues such an order is called the Drawer; the person to whom it is addressed, the Drawee who, in case of acceptance, becomes known also as the Acceptor; and the person to whom the order is made payable is termed the Payee.

Bills of exchange are either foreign or inland. A foreign bill of exchange is a bill of exchange drawn in one country and payable in a different country; while an inland bill of exchange is one both drawn and payable in the same country. In applying these tests to instruments both drawn and payable in the United States, the separate states are treated as if they were different countries. So that a bill of exchange drawn in Illinois and payable in Wisconsin is a foreign bill of exchange.[3]

4. **Usual form of bill of exchange.**—A bill of exchange is usually, though not necessarily, of the following form:

$100.00 Chicago, Illinois, March 1, 1914.

Sixty days ..... after date, pay to the order of ..... Henry Thomas .....
One Hundred ..... Dollars.
Value received and charge the same to account of
To William Smith - - Charles Briggs.
Boston, Massachusetts.

Accepted, William Smith.

[3] Buckner v. Finley, 2 Pet. 586 (U. S.).

Thus, Charles Briggs is the drawer; William Smith, the drawee; and Henry Thomas, the payee. If William Smith accepts the bill he becomes known as the acceptor as well as the drawee of the bill. The acceptance is usually made by writing the word "accepted" across the face of the bill and signing the name or initials thereto.

The payee may indorse the bill, which is done by writing his name upon the back of the instrument and delivering it to some third person. He then becomes known as an Indorser as well as Payee, and the party to whom he thus transfers the bill is called an Indorsee. This indorsee may in turn become an indorser by a similar transfer to still another party and thus sustain a double relation, that of First Indorsee, and Second Indorser. And this process may continue through any number of transfers. The last indorsee or party entitled to the bill is called the Holder.

5. **Check defined and illustrated.**—A check differs from the ordinary bill of exchange, as above defined, in the following particulars. The drawee must be a bank and the instrument must be payable on demand. A check has thus been briefly defined as "a bill of exchange drawn on a bank, payable on demand."

A check is of the following form:

Chicago, Illinois, March 1, 1914.

First National Bank

Pay to the order of.....John Doe.....$100.00
One Hundred ..... Dollars.

Richard Roe.

The First National Bank is the Drawee; John Doe is the Payee; and Richard Roe, the Drawer.

6. **Promissory note defined and illustrated.**—A negotiable promissory note is an unconditional promise in writing made by one person to another, signed by the person making the promise, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to the order of a specified person or to bearer.

The one executing such an instrument is called the Maker; and the one to whom it is made payable, the Payee. The payee in turn may become an indorser, and so on, as in the case of the transfer of a bill of exchange.

The following is an ordinary form of negotiable promissory note:

$100.00 Chicago, Illinois, March 1, 1914.

Sixty days ..... after date .....
I ..... promise to pay to the order of .....
John Doe ..... One Hundred .....
Dollars. With interest at the rate of 6 per cent per annum from date. At.....First National Bank, Chicago. Value received.

Richard Roe.

Roe is the Maker and Doe, the Payee.

7. **Nature and general characteristics of negotiable instruments.**—Speaking generally, a negotiable instrument is a contract. It contains an undertaking or promise, and such promise must be based on, what is known in the law of contracts as, consideration. It is also necessary that one who assumes to become

bound on a bill or note shall possess the legal capacity to make a valid contract.

But while thus alike in some respects, in other very important respects, the negotiable instrument and the common law contract or chose in action are essentially different. These differences, under the early law, were three in number. They related, first, to days of grace; second, to consideration; and third, to negotiability. Some of these differences have been eliminated by modern statutes, but others, of fundamental and far-reaching importance, still obtain and serve today to place bills and notes in a class by themselves.

Days of grace.—Days of grace were a product of the law merchant and were, originally, of much importance. They were days of indulgence—usually three—granted to the obligor on a bill or note and operated to extend the time of payment beyond the ostensible due date. Under this rule, for example, a note ostensibly due June 1, was in reality not due till June 4. By statute, however, days of grace have in most jurisdictions been abolished, so that today, this distinction is chiefly of historical interest.

Consideration. The law merchant says that a bill or note "imports a consideration." This means, merely, that in the absence of some showing to the contrary it will be presumed that consideration was given for it. The practical effect of this doctrine is that the holder of a bill or note need not in suing on the instrument allege or in the first instance offer any evidence of consideration. The burden rests on the party against whom the action is brought to

plead the absence of consideration if none has been given and offer some evidence in support of his plea. But in an action on a common law contract, the burden is upon the party bringing the action both to allege and prove consideration. No presumption of consideration is indulged. In practice, therefore, this distinction between negotiable instruments and common law contracts is very important.[4]

8. **Same subject—Negotiability.**—In attaching to certain obligations the quality of negotiability the law merchant made its most radical departure from the common law. Days of grace and presumptions as to consideration have always been of minor consequence compared with this. It is this quality which, it may be said, chiefly distinguishes the negotiable bill or note from the common law contract or chose in action.

The quality of negotiability is a dual quality. By virtue of it the bill, check or note may be transferred from one person to another, first, so as to vest title in the transferee and second, so as to vest, under certain circumstances, even a better title in the transferee than the transferor had. Such qualities were not known to the common law nor attached to any of the obligations of its creation.

Thus the transferee of a negotiable instrument always has been permitted to bring an action thereon in his own name. He is within the terms of the promise. When the paper is indorsed and delivered to him the promise runs to him.

On the other hand a chose in action could not be

[4] For a fuller discussion of consideration see § 58 and following.

thus transferred at common law. An attempted transfer of it did not invest the assignee with any direct rights against the obligor. Such rights as he did get had to be worked out through his assignor. His rights against the obligor were equitable rather than legal. By modern statutory procedural reform, however, this distinction has been swept away in most, if not all, of the American jurisdictions. So that, today, the assignee of a common law chose in action may bring an action against the obligor in his own name.

At the present time the feature of negotiability of supreme importance resides in the fact that the transferee of negotiable paper may secure, under certain circumstances, better rights than his transferor possessed. Suppose A agrees to pay B $100 for certain services. B assigns his claim against A to C. It turns out that B did not render the services. Even under modern statutes, which permit C to sue in his own name, A may take advantage of B's failure to perform, if sued by C. C can under no circumstances assert any better right than B could. C takes the assignment subject to any and all defenses of A. Ignorance of A's rights and the payment of value to B afford C no protection.

But suppose A executes a note payable to B or order, without receiving any consideration for it. B cannot enforce this note against A. If, however, B indorses this note and transfers it to C before maturity and for value and C, at the time, is ignorant of the defects in B's title, C may compel A to pay the note when it becomes due. Thus the right of the

transferee of the note under these circumstances, rises superior to that of the transferor.

The reason for attaching this property to commercial paper is not far to seek. It is found in the purpose that bills and notes were created to serve. They were intended and used by merchants to take the place of money. Hence it was important, in fact, necessary, that provision be made for their free circulation from hand to hand. In the rush of business, titles could not be investigated. Hence the transferee was permitted to assume that the title of his transferor was good, unless he knew the contrary, and the law protected him in that assumption.[5]

9. **Modern statutory enactment.**—An introduction to the subject of negotiable instruments would not be complete today, without reference to the modern steps which have been taken to crystallize and especially to make uniform the rules of the law merchant by statutory enactment.

The first step of this kind, with which we are particularly concerned, was taken in England in 1882. At that time the English Bills of Exchange Act, the provisions of which deal with promissory notes as well as bills of exchange, became a part of the English statute law.

As early as 1890 a movement was started in the United States to bring about a codification of the law merchant in the several states with a special view to securing uniformity in the different jurisdictions.

Following the lead of New York, commissioners

[5] Carter, A History of English Legal Institutions (4th ed.), p. 276.

were appointed in other states, and in 1895 at a meeting of these commissioners a committee on Commercial Law was instructed to have prepared a codification of the law relating to bills and notes. This committee employed John J. Crawford, Esq., of the New York Bar to prepare the draft. The draft was forthwith prepared and submitted to the conference which met at Saratoga in August, 1896, and with some amendments, was adopted, and is known as "The Negotiable Instruments Law."

Following this, steps were at once taken to secure the adoption of the bill, thus approved, in every state in the Union. Again the state of New York took the lead by passing the law in 1897. Since then this bill has become a law in 38 states.[6] In addition,

[6] Alabama, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Philippine Islands, Rhode Island, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

In view of the widespread adoption of the Uniform Negotiable Instruments Law as above indicated, and in view of the further fact that it will doubtless be adopted in the few remaining states in the near future, it will be necessary in the treatment of the subject of negotiable instruments in this article to make frequent reference to the statutory provisions. Wherever this is done the reference will be to the section numbers used in the draft of the statute adopted by the commissioners on Uniformity of State Laws, and the sections quoted with such numberings will be taken from that act. The reader may easily find the corresponding section in the law of his own state, if this statute has been there adopted, by noting the subject matter of the section quoted or referred to. In referring to the statute the abbreviation N. I. L. (meaning Negotiable Instruments Law) will be used in order that space may be economized.

The Uniform Statute referred to will be found in convenient form in Brannan's Negotiable Instruments Law (2nd ed.). The student should also consult the statute of his own state, freely, if the Uniform Act has been there adopted.

the District of Columbia, Hawaii, and the Philippine Islands have adopted the law; in a few instances, however, with slight modifications.

CHAPTER II.

FORMAL REQUISITES.

10. **Writing.**—That special form of contract known as the negotiable instrument cannot come into existence as an oral obligation. All negotiable instruments must be written. The obligation must be in such form that the eye can see and the hand handle it, like money, the place of which it takes. As the late James Barr Ames puts it in the summary to his collection of cases on Bills and Notes,[7] "A specialty contract (i. e., a bill or note) differs widely from a simple contract. A bill or note, for example, regarded as a document has a substantial value, it being impossible either to compel payment of the obligation or to transfer one's interest therein at law, except by a surrender or transfer of the instrument itself to the payer or purchaser respectively. In other words, the holder's right in personam is dependent upon his having a right in rem." This requirement of writing is fully satisfied by printing and, as far as legal requirements are concerned, the writing may be done either with lead pencil or with ink.[8] It follows that the instrument may be partly written and partly printed, which is of frequent occurrence.

11. **Signature.**—No paper can have the force and effect of a negotiable instrument unless it is signed.

[7] Vol. 2, p. 799.

[8] Geary v. Physic, 5 B. & C. 234 (Eng.).

If it be a bill of exchange or check, the drawer must have signed it and if it be a promissory note, the maker must have signed it.

While the customary place for the signature is at the end of the instrument, it is not necessary that it be there. For example, "I, J. S., promise to pay ....." may be as binding as a promissory note, if otherwise complete, as if it were written, "I promise to pay .....," subscribed, "J. S."[9] In other words, it is only necessary that some designation of the obligor shall appear on the paper, regardless of its location, and that it shall have been intended as a signature. Some question may arise, however, as to whether it was in fact intended as a signature, if it does not appear in the customary place.[10] Nor is it required that one shall sign the name by which he is usually known, nor, in fact, any name at all. Any mark which a person uses with intent to bind himself will answer for a signature. Thus it has been held that the figures "1, 2, 8" were a sufficient signature.[11] So one may bind himself by a trade name, such as "The Acme Company."[12]

It follows that the signature may be printed or typewritten, or by a stamp impression, though in such cases there is no presumption that it is a signature and it must be shown to have been adopted by the party, sought to be charged, as his signature.[13]

[9] Taylor v. Dobbins, 1 Strange 399 (Eng.), LEADING ILLUSTRATIVE CASES.
[10] Schmidt v. Schaelter, 45 Mo. 502.
[11] Brown v. The Butchers' and Drovers' Bank, 6 Hill 443 (N. Y.), LEADING ILLUSTRATIVE CASES.
[12] N. I. L., § 18.
[13] Pennington v. Baehr, 48 Cal. 565.

It is fundamental that a forged signature is no signature. But it has been held in some jurisdictions that the party whose signature has been forged may ratify the forgery and thus become bound by it just as if it had been originally signed by him or by his authority.[14] Some courts, however, have refused to give effect to a ratification of a forgery, on the theory that it is against public policy to permit the ratification of a crime.[15]

It may be added that one's signature may be attached by an agent and that no special form of appointment is required.[16]

12. **A note must contain a promise.**—This does not mean that the word, "promise" must be used, although the expression, "I promise to pay" is the one commonly used. The promise may be an implied promise, merely. But it must be a promise implied in fact, as distinguished from a promise implied in law.

If A borrows $100 from B, the law is said to imply a promise on A's part to pay back the money borrowed; but if A, upon the receipt of the money, writes upon a piece of paper, "Borrowed of B, $100" and signs his name to it, it is not a promissory note. The paper is only what it purports to be, an evidence of indebtedness. The only promise which exists in connection with this transaction is the promise, or obligation, as it might better be called, to repay the borrowed money.

[14] Hefner v. Vandolah, 62 Ill. 483.
[15] Henry v. Heeb, 114 Ind. 275.
[16] N. I. L., §§ 19 and 38.

And so if A goes to the grocer and orders groceries, the law implies a promise on his part to pay for them, even though nothing is said about payment, and a paper signed by A, acknowledging receipt of $10 worth of groceries on credit would not be a promissory note.

The requirement is that the language used must mean "I promise to pay," whether that exact form of expression is used or not. If any implication is resorted to it must lead to the conclusion that the party signing has expressly undertaken to pay. Otherwise the paper cannot be considered a note. There must be more than the mere acknowledgment of indebtedness.

As said by the court in Gay v. Rooke,[17] "While such promise need not be expressed in any particular form of words, the language used must be such that the written undertaking to pay may fairly be deduced therefrom."

13. **Same subject—Examples.**—Applying the rule laid down in Gay v. Rooke, the Massachusetts court decided that a paper in the following form, "I. O. U., John Smith one hundred dollars, for value received" and dated and signed was defective as a promissory note, in that it contained no promise; it was only what it purported to be, viz., an ordinary due bill.

Some courts, however, while recognizing fully the time honored requirement of the law merchant, that there must be a promise in fact, have fastened upon very slight circumstances in order to find this promise.

For example, instruments in the following form

[17] 151 Mass. 115.

have been held to satisfy the requirement: "Due A. B., $100, payable on demand;"[18] and "I O. U. $100 to be paid on the 22nd instant;"[19] and one court went so far as to hold that the expression, "due, on demand" meant "which we promise to pay on demand," and hence that this was not a mere acknowledgment of indebtedness.[20]

The cases just referred to have been cases where it was only necessary to find that the instruments in question were non-negotiable notes. They are in point, however, because even the non-negotiable note must contain a promise, and they show what language has been considered sufficient to raise a promise in fact.

Where words of negotiability have been used, such as "bearer" or "order," these very words have been held indicative of a promise in fact. It has been said that if the paper reads, "Due A. B. or order" or "Due bearer," a certain sum of money, it is not a mere acknowledgment of indebtedness, because no one would acknowledge indebtedness to an undetermined person. Thus certificates of deposit, which contain words of negotiability as they usually do, have been held to be negotiable instruments and in effect, notes.[21]

14. **A bill of exchange must contain an order.**—This rule has reference to the direction that is given by the drawer of a bill to the drawee. Referring

[18] Kimball & Kiniston v. Huntington, 10 Wend. 675 (N. Y.).

[19] Brooks v. Elkins, 2 M. & W. 74 (Eng.).

[20] Smith v. Allen, 5 Day 337 (Conn.); compare Currier v. Lockwood, 40 Conn. 349, LEADING ILLUSTRATIVE CASES.

[21] Miller v. Austen, 13 How. 218 (U. S.).

back to the definition of a bill of exchange and the sample form given, it will be noted that, in substance, a bill of exchange is a direction in writing by A to B to pay a certain sum of money to C. The first requirement is that this direction must be an order. This means that it must be a command, and not a mere request for a favor.

The bill of exchange did not come into existence to supply a form by which A might help his friend C, to secure money from B, nor to supply a form of message for A to use if he desired to borrow some money from B, and to send C as a messenger to get it.

The bill of exchange was created to supply a great need in the commercial world; to meet the commercial, not social convenience of the people.

Suppose B, who lives in New York City, owes A, who lives in Chicago, $100, and A, in turn, owes C, who lives in New York City, $100 or less. If both of these obligations are settled by the use of cash, it will necessitate the sending of money by B in New York to A in Chicago, and the sending of money from A, in Chicago, to C, in New York.

By the use of a bill of exchange, this transportation of cash two ways can be easily avoided. A will "draw,"—to use the commercial expression—on B in favor of C, i. e., A will order or command B to pay C the amount which A owes C. This bill is mailed to C, who presents it to B, and when B pays C, the two obligations are expeditiously and conveniently settled, without the cumbersome and dangerous method attendant upon the transference of cash.

It is apparent in this illustration, that A has a busi-

ness right to call on B to pay C the sum of money indicated. He is not asking a favor of a friend.

15. **Same subject—Test and examples.**—It does not follow, however, that words of politeness cannot be used, or that it will be presumed from the use of such words that a favor is being asked, rather than a right demanded. Often a bill of exchange begins, "Please pay," rather than "Pay."[22] The test is, does the paper purport to be a demand made by a person having a right to call on the other to pay, or is its fair meaning, "You will grant me a favor by so doing?" If the former, it contains the necessary order, if the latter, it does not. On principle, it would seem, the answer ought to be obtained from the instrument itself and from no outside sources. But it cannot be said that the courts have in every case so limited their investigation, but have, in some instances, looked at surrounding circumstances.

In Hamilton v. Spottiswoode,[23] an instrument in the following form: "Dear Sir.—We hereby authorize you to pay, on our account, to the order of W. G., etc.," was held not to contain an order, Parke, B., remarking: "Here there is only an option to pay or not, therefore, this document is not a bill of exchange. * * *"

And in Little v. Slackford,[24] Lord Tenterden held that an instrument in the following form was not a bill of exchange: "Mr. Little.—Please let the bearer have seven pounds, and place it to my account and

[22] Wheatley v. Strobe, 12 Cal. 92, LEADING ILLUSTRATIVE CASES.
[23] 4 Ex. 200 (Eng.).
[24] Reported in Moody & Malkin, 171 (Eng.).

you will oblige, Your humble servant, R. Slackford." The court said, "* * * The paper does not purport to be a demand made by a party having a right to call on the other to pay. The fair meaning is, 'You will oblige me by doing it.'"

16. **Both bills and notes must be payable in money.**—Bills and notes take the place of money. They are expected to circulate freely in the commercial world. They would not do this if they called for the delivery of some commodity rather than money. There would be obvious difficulties in the matter of circulation if the obligation were to deliver a horse, instead of to pay money. Money is the only thing with a fixed and generally known value.

Thus it has been held that a promise to pay A or bearer $50, "in good merchantable whisky, at trade price," is not a promissory note.[25]

Commercial paper may, however, require the payment of a certain kind of money. It is of frequent occurrence that a note calls for payment in United States gold coin. And likewise it may require payment in United States silver dollars.

17. **Same subject—What is money?**—No doubt, anything that is legal tender satisfies the requirement. Legal tender has been defined by statute to be, gold and silver coins, and United States Treasury notes.[26]

But there are other media of exchange circulating freely in the commercial world as money, and in fact dealt with and accepted by every one as such, but

[25] Rhodes v. Lindly, 3 Ohio 51, LEADING ILLUSTRATIVE CASES.
[26] U. S. Rev. Stats., § 3585 and following.

which are not legal tender in payment of any debts. Every one is familiar with United States gold and silver certificates and national bank notes, and at an earlier day, state bank notes. These all are, as a matter of law, only, themselves, negotiable instruments. And yet they have a much wider and freer circulation than negotiable instruments issued by private individuals or private institutions, and naturally so because of the security which is back of them.

But will a bill or note made payable in such media of exchange be treated as negotiable? This question has been the source of much controversy. It has come up for discussion in the courts generally in connection with instruments made payable in "current funds" or "currency." Some courts have avoided a direct answer to the question by holding that "current funds" means "current money" and that "current money" means legal tender money, reaching in this way the conclusion that instruments thus payable are negotiable.[27]

Other courts hold that money means legal tender; that current funds cannot be given the restricted meaning; and hence that paper payable in current funds is not negotiable commercial paper.[28]

Still other courts construe "current funds" broadly to include any medium of exchange circulating in the channels of trade as money, and hold generally that instruments payable in "current funds," "current

[27] Bull v. Bank of Kasson, 123 U. S. 105.

[28] Platt v. The Sauk County Bank, 17 Wis. 222; Hasbrook v. Palmer, 2 McLean 10 (U. S. Circ.), LEADING ILLUSTRATIVE CASES.

money" or even "current bank notes" are payable in money within the requirements of the law merchant.[29]

18. **Same subject — Statutory provisions.** — The Negotiable Instruments Law provides[30] that the negotiable character of an instrument is not affected by the fact that it "designates a particular kind of current money in which payment is to be made." And the Illinois statute, which has departed in several particulars from the draft which was adopted by the commissioners, goes further and provides that it may be made payable in "currency or current funds."

Inasmuch as there was a difference of judicial construction of such expressions as are used in these statutes, and since the statutes do not assume to define these terms it may well be doubted if the statutory provisions have brought about uniformity on this question.

Obviously the safe thing to do is to make the instrument payable in some particular kind of legal tender or generally in dollars and cents, which would require payment in some form of legal tender money.

19. **Same subject—Foreign money.**—A question has also been raised as to the negotiability of paper which is made payable in money of a foreign denomination.

For example, suppose a note made payable in the United States reads that the promisor is to pay 100 pounds sterling. This has been construed to mean

[29] Pardee v. Fish, 60 N. Y. 265; Swift v. Whitney, 20 Ill. 144.
[30] N. I. L., § 6, subsection 5.

that it is payable in the United States equivalent, and hence negotiable.[31]

If, however, the instrument is so drawn as to require the delivery of the foreign coins themselves, it will not be negotiable, for the foreign money in this country is merely a commodity.[32]

20. **A bill or note must not contain an obligation to do anything in addition to the payment of money.** —If A promises to pay B or order $100 and to deliver to him, at the same time, a horse, the instrument is not a note, although it may possess every other requisite.[33] In this form the obligation is an ordinary contract. Likewise an order directing the drawee to pay $400, and take up a note executed by the drawer in favor of A, is not a bill.[34]

If, in a word, the instrument is to take the place of money, if it is to circulate freely in the marts of trade, it must call for the payment of money and for nothing else. This idea has been couched in the graphic language, that a negotiable instrument is a "courier without luggage."

21. **Same subject—Election to require something in lieu of money.**—It is necessary to distinguish carefully between an instrument which imposes some obligation in addition to the payment of money, and one which offers the holder an election to require something else to be done as a substitute for the payment of money. Consider, for example, the following case: "On or before the fifth day of April, 1843,

[31] 1 Daniel, Negotiable Instruments (5th ed.), § 58.
[32] Thompson v. Sloan, 23 Wend. 71 (N. Y.).
[33] Martin v. Chauntry, 2 Strange 1271 (Eng.).
[34] Cook v. Satterlee, 6 Cow. 108 (N. Y.).

I promise to pay A B or bearer, $500—the said A B is to take all the flour that he may want for his family use, and such other articles that he may need previous to the day of payment." The Supreme Court of Illinois[35] held this to be a good note, saying: "This is a positive undertaking on the part of the makers to pay the sum of money therein mentioned at its maturity, and the legal import of the memorandum at the bottom is, that the payee may, if he chooses, take what flour and other articles he may need for the use of his family previous to the day of payment. It is a condition inserted for his benefit. There is no duty or obligation imposed upon the makers to pay in this manner, unless the payee, in his judgment, should need the property. The defendant below (the maker) could not have tendered the same and thereby, against the wish of the plaintiff below (the payee), have discharged the note."

This result is reached only in cases where the option is with the payee or holder to require at all events, if he choose, the payment of money, rather than the delivery of the chattel. If the maker has the option to choose which of the alternative obligations he will carry out, the instrument is, without question, not negotiable. Negotiable paper must have an unconditional money value. This can only be where the payee or transferee knows that he can insist upon the payment of money on it when it becomes due.

22. **Same subject—Authority to sell collateral se-**

[35] Owen v. Barnum, 7 Ill. 461. See also Hosstatter v. Wilson, 36 Barb. 307 (N. Y.), LEADING ILLUSTRATIVE CASES.

curities.—An instrument does not lose its character as negotiable paper by reason of a recital that the maker has deposited collateral security for its payment, and has further authorized its sale and provided the manner in which it shall be sold, in case the note is not paid when due.

Thus a stipulation in the following form, added to an instrument otherwise negotiable, does not affect its negotiability: "I have deposited, herewith, with the A B Company, mortgage bonds as collateral security, which I authorize the holder of this note upon the non-performance of this promise at maturity, to sell, at public or private sale."[36]

Obviously, such a stipulation should not affect the negotiability of the instrument. It is not "luggage." It will not retard the circulation of the paper. The commercial value of the instrument is increased, rather than diminished, by such a provision.

23. **Same subject—Authority to confess judgment.**—A provision in a promissory note, authorizing any attorney of any court of record to appear and confess judgment on behalf of the maker in favor of the holder of the note, if it is not paid when due, is common in many states.

In an early Pennsylvania case,[37] it was held that such a provision rendered the note non-negotiable. But this decision has been severely criticised, and the great weight of modern authority sustains the negotiability of such instruments.[38]

[36] Valley National Bank v. Crowell, 148 Pa. St. 284.

[37] Overton v. Tyler, 3 Pa. St. 346.

[38] 1 Daniel, Negotiable Instruments (5th ed.), § 61; N. I. L., § 5, subsection 2.

24. **Same subject—Waiver of exemptions.**—It is sometimes provided in a note that the maker will not claim the benefit of any homestead or other exemption laws as to that obligation. In other words he agrees that, if he is sued on the note, he will not oppose the attachment and sale under execution of the home in which he lives or any part of the wages he may be earning.

It has been generally held that provisions of this character do not render the instrument to which they are attached non-negotiable. Like some of the other provisions, heretofore mentioned, they do not impede its circulation but rather aid it.[39]

25. **Certainty—In general.**[40]—No requirement is more fundamental, or more indelibly attached to the law of commercial paper than that of certainty.

There must be certainty in four particulars: the obligation to pay; the sum to be paid; the time of payment; and the parties to the instrument. Uncertainty in any one of these particulars will prevent the instrument from rising higher in the scale of legal obligations than an ordinary contract.

26. **Certainty of obligation.**—The obligation of a negotiable instrument cannot be contingent. The undertaking must be absolute, unconditional. The usual statement is that it must contain an unconditional promise or order.

The importance of this requirement and the reason for it is well stated by the Supreme Court of

[39] Zimmerman v. Anderson, 67 Pa. St. 421; N. I. L., § 5, subsection 3. But see Ill. Rev. Stats., chap. 98, § 23, which forbids waiver of exemptions from execution.

[40] N. I. L., § 1, subsection 2.

fund that renders the order or promise conditional or contingent. If, for example, A draws an order on B in favor of C or order, absolute in its terms, and then in addition indicates a fund out of which B may reimburse himself, the order is not considered conditional.[49]

It is necessary, therefore, to observe carefully in every case, where a particular fund is mentioned, whether the money is to be paid out of that fund, or whether the fund is mentioned merely as a source of reimbursement.

But what is the test? In Munger v. Shannon,[50] the court says: "The true test would seem to be whether the drawee is confined to the particular fund, or whether, though a specified fund is mentioned, he would have the power to charge the bill up to the general account of the drawer, if the designated fund should turn out to be insufficient. In the final analysis of each case, it must appear that the alleged bill of exchange is drawn on the general credit of the drawer."

It is not always easy to determine in which class the particular instrument belongs. In Whitney v. Eliot National Bank,[51] where the direction was to pay and "charge the same to account of 250 bbls. meal ex. Schooner Aurora Borealis," the court held that the order was not conditional. The same result was reached in a similar case by the Supreme Court of Maine.[52]

[49] N. I. L., § 3, subsection 1.
[50] 61 N. Y. 251, at 255.
[51] 137 Mass. 351.
[52] Redman v. Adams, 51 Me. 429.

But the reader should compare with these two cases the holdings in the cases of Lowery v. Steward and Buttrick Lumber Co. v. Collins, referred to in a previous section.

In this connection the decision in Munger v. Shannon, quoted above, is also of interest. There it was held that an order to pay "and deduct the same from my share of the profits of our partnership business in malting" meant "pay by deducting," and that this, then, in effect, was an order to "pay out of an uncertain fund," and could not be treated as a bill of exchange.

29. **Same subject—Effect of statement of transaction which gives rise to instrument.**—It has been frequently said that a statement of the transaction which gives rise to the instrument does not render the promise or order conditional. In fact, this statement had received such currency that it was incorporated in the Negotiable Instruments Law, without qualification.[53]

One cannot, however, examine the cases at any length, decided both prior to and under the statute, without learning that the statement in its absolute and unqualified form is misleading, if, in fact, it is not untrue. It is quite true that such a statement may not render the promise conditional; but, again, it may render it most clearly conditional.

All agree that, if A promises to pay B or order $100, and it is stated in the instrument that the sum is in payment for a horse sold and delivered to A prior to or at the time of the execution of the note,

[53] N. I. L., § 3, subsection 2.

such statement does not render the undertaking conditional. It reveals no circumstances which can, by any possibility, render the obligation to pay uncertain. It is immaterial whether the instrument is given for a chattel purchased or money loaned. The consideration is valid and the undertaking to pay absolute.

On the other hand, such a rule could hardly be made use of to support the negotiability of an instrument, in which it was provided that it was given as collateral security for some other obligation, for in that event it would be payable only in case the other obligation were not paid. Hence, the undertaking in the note would be contingent, conditional. And it has been so held.[54] Yet this was only a statement of the transaction which gave rise to the instrument. But the statement shows the undertaking in the note to have been conditional, and the note, therefore, non-negotiable.

30. **Same subject—Conditional sales notes.**—Going further, we find a notable conflict of authority with reference to a very common class of instruments. The following case is typical: A goes to a furniture store owned by B and orders some furniture. The price is $100. A signs an instrument in which he promises to pay B or order $100 on or before one year from date. Thus far the instrument is in the form of an ordinary negotiable note. But there is added to the above a statement that the note is given to cover the purchase price of certain furniture and it is expressly provided that title to

[54] Costelo v. Crowell, Admr., 127 Mass. 293.

the furniture shall remain in B until the note is fully paid.

In New York[55] and Minnesota[56] such instruments have been held non-negotiable on the ground that the obligation of the maker is conditional. The Minnesota court said: "If, prior to any default on the part of the defendant (maker), the company (payee) had retaken possession of the property, and disposed of it, so that, upon the maturity of the defendant's obligation, an observance of the condition on its part had been impossible, there can be no doubt that, under such circumstances, no action could have been maintained on the promise."

On the other hand, Michigan[57] and the Supreme Court of the United States[58] have held such paper negotiable. These courts reason that the transaction is in the nature of a sale and mortgage back by the purchaser to the seller, the title being retained merely as security for the note, and that the note may be considered apart from the security, and hence as absolute in its terms and not conditional.

It is believed that this is the only theory upon which the negotiability of such paper can be supported.

31. **Same subject—Executory consideration mentioned.**—This general rule has also given rise to controversy in another class of cases. Suppose A prom-

[55] Third National Bank of Buffalo v. Spring, 59 N. Y. Supp. 794 (Construing statute).

[56] Third National Bank etc. v. Armstrong, 25 Minn. 530.

[57] Choate v. Stevens, 116 Mich. 28, 74 N. W. 289, 43 L. R. A. 277.

[58] Chicago R. Equip. Co. v. Merchants' Bank, 136 U. S. 268, 34 Law. Ed. 349.

ises, in writing, to pay B or order $100 on July 1, 1913, and the recital is made that the instrument is for 100 bushels of wheat to be delivered by B to A on June 1, 1913. The note is executed in May, 1913. Illinois,[59] New York[60] and Maryland[61] have held such an instrument negotiable. Georgia[62] has apparently reached a contrary result.

In conclusion, it is submitted that the test to be applied in any case in determining the effect of a statement of the transaction which gives rise to the instrument, is whether it indicates that the obligation of the maker to pay depends upon some contingency. If it does, the instrument is not negotiable. If it does not, the instrument is negotiable, provided, of course, other requisites are present.

32. **Sum payable must be certain—In general.**—Every negotiable instrument must show on its face the exact amount of the obligation. The amount that is to be paid when the instrument matures cannot be left to conjecture.

A promise, therefore, to pay $50 "and such additional premium as may arise on policy No. 50" is a promise to pay an uncertain amount. In deciding against the negotiability of an instrument in this form the court in Dodge v. Emerson,[63] said: "The defendants in this case have promised to pay two several sums; one certain and definite, the other un-

[59] Siegel, Cooper & Co. v. Chicago Trust & Savings Bank, 131 Ill. 569, 19 Am. St. Rep. 51, LEADING ILLUSTRATIVE CASES.

[60] Davis v. McCready, 17 N. Y. 230.

[61] Black v. The First National Bank, 96 Md. 399, at 418.

[62] Harris v. Nichols, 26 Ga. 413.

[63] 34 Me. 96, LEADING ILLUSTRATIVE CASES.

certain and contingent. The defendant's liability being for both these sums, is obviously for an unascertained and indefinite amount."

Nor, according to the same case, can the character of the instrument be changed by a willingness on the part of the holder to waive all right to the uncertain portion of the obligation.

33. **Same subject—Agreement to pay attorneys' fees or costs of collection.**—But it is not every undertaking to pay some uncertain additional sum that renders an instrument non-negotiable.

There is no more common provision in promissory notes today than one which requires the maker, in addition to the payment of the principal sum, to pay such additional sum as the court may adjudge reasonable as an attorney's fee, in case suit becomes necessary to collect the note. And some instruments are worded more broadly, providing for costs of collection where the means taken do not culminate in actual litigation.

It is not surprising, however, when one considers the emphasis that the law merchant has laid upon certainty and singleness of obligation, that such instruments have been the subject of controversy. Some of the states have sustained the negotiability of these instruments, differing, however, as to whether the additional stipulation is, itself, enforcible. Others have held that the provision, though valid, destroys the negotiability of the instrument, thus treating the entire instrument as a simple contract; while still others have held that the stipulation renders the entire contract void.

The weight of authority is found in favor of the doctrine that the negotiability of a commercial contract is in no way affected by a stipulation for the payment of a reasonable collection or attorney's fee.[64]

Since such provisions do not become really operative until the note matures, at which time the chief incident of negotiability is ipso facto lost, as will be pointed out later, and since such provisions do not affect the amount due at maturity, and since, further, such provisions will add to rather than detract from the currency of the paper, it is not startling to find that the Negotiable Instruments Law has inserted a clause favorable to the negotiability of this class of instruments.[65]

34. **Same subject—Agreement to pay exchange.** —An agreement to pay exchange, in addition to the face of the bill or note, has also been the source of some conflict.

For example, suppose the maker of a note promises to pay the same in Chicago, "with current exchange on New York City."

The Supreme Court of Minnesota,[66] in passing upon the negotiability of such a note, said: "In the definitions of a promissory note or bill of exchange it is generally, if not always, stated that the amount necessary to discharge it must be ascertainable from the face of the paper itself, without having to refer to any extrinsic evidence. Construing this definition

[64] 1 Daniel, Negotiable Instruments (5th ed.), § 62a.
[65] N. I. L., § 2, subsection 5.
[66] Hastings v. Thompson, 54 Minn. 184.

literally, it must be admitted that the instruments in question do not fall within it, for, of course, extrinsic evidence must be resorted to in order to ascertain the rate of exchange at a given time between two places."

After pointing out the wide conflict of authority on the question, and stating its decision in favor of the negotiability of such instruments, the same court ably gives its reasons as follows: "The reason and purpose of the rule that the sum to be paid must be certain is that the parties to the instrument may know the amount necessary to discharge it without investigating facts not within the general knowledge of everyone, and which may be subject to more or less uncertainty, or more or less under the influence or control of one or other of the parties to the instrument. The provision for the payment of the current rate of exchange between the place of payment and some other place is not within the reason of this rule, or subject to the evils or inconveniences which it was designed to prevent. While the rate of exchange is not always the same, and while it is technically true that resort must be had to extrinsic evidence to ascertain what it is, yet the current rate of exchange between two places at a particular date is a matter of common commercial knowledge, or, at least, easily ascertainable by anyone, so that the parties can always, without difficulty, ascertain the exact amount necessary to discharge the paper. The law merchant, including the law of negotiable paper, is founded upon and is the creature of commercial usage and custom. * * * Its rules should, there-

fore, be construed with reference to and in harmony with general business usages, and, as far as possible, with the common understanding of the commercial world. * * * Now, we think we are safe in saying, and justified in taking notice of the fact, that if bankers or other business men accustomed to dealing in commercial paper were asked whether such an instrument is a promissory note, and whether they would deal with it as negotiable paper, the answer would, in almost every instance, be unhesitatingly in the affirmative. We have no doubt that this is the way in which such paper is generally looked upon and treated in commercial and other business circles; and, if so, the courts should, as far as possible, make their decisions conform to this general custom and understanding."

This view was adopted in the Negotiable Instruments Law, where it is provided that "The sum payable is certain * * * although it is to be paid with exchange, whether at a fixed rate or at the current rate."[67]

35. **Same subject—Agreement to pay interest.**—Less foreign to the commercial contract, and hence giving rise to less dispute than the foregoing provisions, is a stipulation for the payment of interest on the principal sum. But even this may render the exact amount ultimately payable uncertain, especially where the exact time that the instrument is to run is not fixed. Ordinary provisions for the payment of interest have, however, never been seriously questioned.

[67] N. I. L., § 2, subsection 4.

But suppose the provision is that the note shall draw interest at the rate of 7 per cent, if paid at maturity, and if not paid at maturity, the interest is to be figured at 10 per cent from the original date. Even such a provision does not render the note non-negotiable.[68] Three reasons may be assigned for this result. First, the amount due at maturity is certain from the outset. The uncertainty arises only in case the note is dishonored at maturity and so long as the sum which will discharge the instrument at maturity is certain, the demands of the business world are satisfied. After maturity the paper becomes essentially non-negotiable for other reasons, as will be seen later. Second, there is no time at which the exact amount that the obligation calls for cannot be determined from the face of the note. Third, interest is a very incidental thing in the note and is a usual thing to contract about.

36. **Same subject—Agreement to pay taxes.**—An agreement included in a note requiring the maker to pay all taxes and assessments that may be levied against the note, has been held to render the instrument non-negotiable.[69] The result is obviously correct, whether it be said that the agreement renders the amount of the obligation uncertain, or whether it be treated as an agreement to do something in addition to the payment of the note.

The same result has been reached where the stipulation for the payment of taxes was contained in a mortgage given to secure the note, rather than in

[68] Smith v. Crane, 33 Minn. 144.
[69] Walker v. Thompson, 108 Mich. 686.

the note itself. The argument in support of this conclusion is that the note and mortgage must be construed together, and hence that the provisions of the mortgage become, as it were, a part and parcel of the note, and thus the provision is treated just as if it had been actually written in the note.[70]

But this theory, that the terms of the mortgage must be read into the note, has been forcefully rejected by the Supreme Court of Wisconsin in the recent case of Thorpe v. Mindeman,[71] and also by the Supreme Court of Colorado in the case of Frost v. Fisher.[72]

37. **Time of payment must be certain.**—No provision of the law merchant, with reference to certainty, has received rougher treatment than this. All that is left of the rule is, that the instrument must be payable at a time which is sure to come, although the exact date of maturity cannot be predicted. Surely the mind of the beginner will be shocked by the statement that a note which is payable "ten days after the death of X" satisfies beyond cavil the requirement of certainty as to time of payment, yet such is the undoubted law.[73]

It may well be questioned whether any paper could be open to greater objection. How much currency in the commercial world can such paper have? How far does it resemble or can it take the place of money? Suppose it is desired to transfer such

[70] Garnett v. Meyers, 65 Neb. 287, 94 N. W. 803.

[71] 123 Wis. 149.

[72] 13 Colo. 322.

[73] Colehan v. Cooke, 2 Str. 1217, Willes 393 (Eng.); Shaw v. Camp, 160 Ill. 425, LEADING ILLUSTRATIVE CASES.

paper. How can the transferee determine whether he is getting paper that is past due? And this is a matter of great importance, for, as will be pointed out more fully later on, one who takes paper after it has fallen due is not a "holder in due course," that is to say, he takes the paper subject to all defenses.

Again, suppose the paper is transferred by A, the payee, to B, as indorsee, before the death of X. Now, a valuable right of the indorsee of a negotiable paper is the right to compel the indorser to pay the instrument if the maker fails to pay it. But in order to assert this right against A, B must, without fail, present the note to the maker the day it is due and give notice at once to A, if the maker fails to make payment. How can B be sure of doing this unless he stations a guard over X so that he may learn at once of X's death? It is very plain that the negotiability of such an instrument is, on principle, open to serious question.

The law was so well established, however, that it was thought best to incorporate it into the provisions of the Negotiable Instruments Law. The statute thus provides that the time of payment is certain if the instrument is made payable "on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain."[74]

38. **Same subject—Paper payable in installments.** —In view of the foregoing results, instruments can afford no difficulty which are made payable at a fixed

[74] N. I. L., § 4, subsection 3.

time after date or sight, or on or before a fixed date at the option of the maker, or in stated installments,[75] either of principal or interest, with a provision that the whole shall become due immediately in case of failure to pay a single installment when due. Such instruments have been generally held negotiable and are provided for in the Negotiable Instruments Law.[76]

39. **Same subject—Time not sure to come.**—If the time for payment be not sure to happen the non-negotiability of the paper is conceded. The obvious reason is that the obligation to pay is uncertain if the event upon which payment depends is contingent. If the time may never come, the obligor may never be obliged to pay.

Thus, if I promise to pay "when my ship comes in" I may never have to pay, for my ship may never come in. Nor is the defect cured by the happening of the event.[77] It has also been held that a promise to pay when X becomes twenty-one years of age renders the instrument non-negotiable, for the reason that X may die before he reaches the age of twenty-one.[78]

But certain provisions falling short of absolute certainty have been construed as requiring payment in a reasonable time. For example, a promise to pay "on demand, when convenient," the Iowa court said required payment at all events in a reasonable

[75] Hollinshead v. John Stuart & Co., 8 N. D. 35, 77 N. W. 89, 42 L. R. A. 659.

[76] N. I. L., § 4, subsections 1 and 2.

[77] N. I. L., § 4.

[78] Kelley v. Hemmingway, 13 Ill. 604.

time,[79] and a note payable "as soon as collected from my accounts at P" was held negotiable by the Supreme Court of Missouri and payable in a reasonable time.[80]

A note in which no time for payment is expressed is treated as payable immediately and thus as a demand note.[81]

40. **Same subject—Payable on demand.**—A note payable on demand may occasion some difficulty to the beginner, for it may be thought that since demand may never be made it may never become due. But the law is that such a note is negotiable and is due at once. Suit may be started on such a note the moment it passes out of the hands of the maker, and without any actual demand being made on the maker. The suit itself is considered sufficient demand. For purposes of transfer, however, it is not treated as overdue until a reasonable time has elapsed from the date of issue.

The Negotiable Instruments Law defines demand paper as follows: "An instrument is payable on demand: first, when it is expressed to be payable on demand, or at sight, or on presentation; or, second, in which no time for payment is expressed. Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand."[82]

41. **Payee must be certain.**—It is provided in the

[79] Works v. Hershey, 35 Iowa 340.

[80] Ubsdell & Pierson v. Cunningham, 22 Mo. 124.

[81] Herrick v. Bennett, 8 Johnston, 374 (N. Y.); N. I. L., § 7, subsection 2.

[82] N. I. L., § 7.

Negotiable Instruments Law[83] that "Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty," and, further, that "It may be drawn payable to the order of—

1. A payee who is not maker, drawer, or drawee; or
2. The drawer or drawee; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or
6. The holder of an office for the time being."

The rule that a payee must be named or in some way indicated on the paper is imperative.[84]

In Gordon v. Lansing State Savings Bank[85] it was held that a check payable "to the order of —— $100," i. e., with a line drawn through the blank wherein the name of the payee is usually inserted, was void for want of a payee, and the same result was reached in Smith v. Willing,[86] in which a note was drawn payable "to the order of $25.00," there being one continuous blank line from the words "order of" to "dollars" and the amount being written in at the extreme left, as indicated.

In England, under the Bills of Exchange Act, which has provisions in it like those quoted above from our Negotiable Instruments Law, the following

[83] N. I. L., § 8. In the Illinois Act, in addition to these provisions, it is further provided that "an instrument payable to the estate of a deceased person shall be deemed payable to the order of the administrator or executor of his estate." Ill. Rev. Stats., chap. 98, § 26, subsection 7.

[84] Brown v. Gilman, 13 Mass. 158, LEADING ILLUSTRATIVE CASES.

[85] 133 Mich. 143, 94 N. W. 741.

[86] 123 Wis. 377, 101 N. W. 692.

case arose: "Five months after date pay to ——— order the sum of 150 pounds," the instrument otherwise being in the form of a bill of exchange. The English court said that this was a good bill of exchange, the meaning of it being, "Pay to the order of drawer," thus finding a payee.[87]

42. **Same subject—Payee need not be named.**—The language of the statute clearly indicates that the name of the payee need not appear in the instrument. The payee need only be "indicated therein with reasonable certainty." If language is used from which the person intended can be identified the legal maxim is applied, that "that is certain which is capable of being rendered certain." To illustrate: a note payable to the order of the person who shall thereafter indorse it,[88] or a note payable to the heirs of X,[89] is sufficiently certain as to payee. So, too, the payee may be designated merely as "bearer." Paper of this kind is most common.[90]

43. **Same subject—Who may payee be?**—Provisions 1, 2, 3 and 4 of the statute[91] are easily understood and give rise to no difficulties. Obviously, the payee may be one who is not otherwise connected with the instrument. This is the ordinary situation. On the other hand, it is quite as proper for the same individual to fill different positions. I may draw a check payable to my own order as well as to the order of someone else. Of course, as long as I retain

[87] Chamberlain v. Young, (1893) 2 Q. B. (C. A.) 206 (Eng.).
[88] U. S. v. White, 2 Hill 59 (N. Y.).
[89] Cox v. Beltzhoover, 11 Mo. 142.
[90] Blackman v. Lehman, Durr & Co., 63 Ala. 547.
[91] See § 41 of this article.

possession of this check it is ineffective. But when I endorse it and deliver it to another it has all the incidents attached to it that the law merchant attaches to any check. Likewise a note payable to the order of A, B and C is good. All have title jointly. All must indorse in order to pass title. Presumptively their interests are equal.[92]

44. **Same subject—Alternative payees.**—Prior to the Negotiable Instruments Law an instrument payable to A or B, or order, i. e., to A or B, in the alternative, was, by the great weight of authority, not negotiable.[93] The reason assigned was that the payee was not certain. Who could know whether the money would finally go to A or B?

The effect of provision 5 of the statute[94] upon the prior law as thus stated has been the subject of some controversy. It has been thought by some that the statute does not cover the case of alternative payees, but that it has reference merely to a note made payable to A and B, or the order of either of them; in other words, that the statute merely permits the maker or drawer to provide that one or more of the payees may indorse for all.

This construction would seem rather strained and apparently is not in accord with the result intended by the draftsman of the act.[95] Nor does this construction meet with the approval of some of the more recent text writers.[96]

[92] Tisdale, Ex'or, v. Maxwell, 58 Ala. 40.
[93] 1 Daniel, Negotiable Instruments (5th ed.), § 103.
[94] See § 41 of this article.
[95] Crawford's Negotiable Instruments Law (3rd ed.), p. 20.
[96] Selover, Negotiable Instruments (2nd ed.), p. 75.

So far as can be learned at this writing this provision has been before the courts for construction only once. In Union Bank of Bridgewater v. Spies,[97] it was held that the statute changed the prior law and rendered negotiable a note payable in the alternative to A or B.

The Iowa court, it is submitted, has reached a correct result. On principle there is no apparent reason for holding such instruments non-negotiable. There is no uncertainty about such paper that can impede its free circulation. Either A or B is within the description of the instrument. Payment to either would discharge it, and either has power to transfer it. What more is needed? Much weight is added to this view by the fact that the English Bills of Exchange Act is more carefully worded than our statute and specifically provides that an instrument payable to named persons "in the alternative" is negotiable.[98]

45. **Same subject—Payee, the holder of an office for the time being.**[99]—The reference here is to an instrument payable to what has often been referred to as a "floating payee." And the disposition of the courts has been to treat such instruments as non-negotiable.

Daniel,[1] in his work on Negotiable Instruments, speaking of the law prior to the statute, says: "If a note were made payable to the secretary, for the time being, of a certain society, it would not be suffi-

[97] 151 Ia. 178.

[98] English Bills of Exchange Act, § 7, subsection 2.

[99] See § 41 of this article.

[1] 1 Daniel, Negotiable Instruments (5th ed.), § 101.

cient, as it would be a floating promise, the performance of which would be made to the person being secretary at maturity; but if it be payable 'to the now secretary' of a certain society, it would be different, as such person could be immediately and definitely ascertained."

Professor Greeley, in reviewing the Negotiable Instruments Law as enacted in Illinois, shortly after its adoption, in an article in the Illinois Law Review,[2] said of the section of the statute here in question: "This provision apparently changes the law as laid down by the authorities generally, to the effect that an instrument payable to such person as may at the maturity of the instrument hold a certain office or position, is uncertain as to payee, and hence not negotiable."

Doubtless Professor Greeley's conclusion is correct as to the general effect that this provision has had upon the prior law, but it may be suggested that it still leaves an air of mystery about the real meaning of the expression, "holder of an office for the time being." It is submitted that it means that the instrument is really payable to the office and not to the incumbent, and anyone who happens to hold the office has authority to deal with the paper so long as he fills the position. Apart from the question of the person who is to receive payment, is the question as to who can endorse it before it is due. If you consider only the individual who happens to be the holder of the office at maturity as the payee, there will be a period of time between the time of execu-

[2] 2 Illinois Law Review, 147.

tion and the time of payment when there will be doubt about who can endorse. A may hold the office when the paper is executed, but who can say whether A will be the officer when it matures? Yet it is believed that A may transfer title to the paper in question the day he receives it. If such is the meaning given to this expression, the soundness of the rule cannot be questioned. Under any other construction the paper is open to serious objection.

46. **Drawee of a bill of exchange must be certain.** —The rule as it grew up under the law merchant is accurately phrased in the Negotiable Instruments Law, which provides: "Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty."

The common case is where the drawee is definitely named and his address given, as, for example: "To A B, No. 8 Wall Street, New York City," or "To First National Bank of Chicago."

But the following instruments, though somewhat indefinite, have been held to be good bills of exchange: "Pay J. J., 78 pounds.

At Mason & Co. (Signed) J. S."

and "Pay to me or my order 10 pounds, payable at No. 1 Wilmot St. (Signed) A. B." In the former case[3] the court said "At Mason & Co." meant "To Mason & Co.," and in the latter case[4] that the bill was in effect directed to the person living at that address.

The second case, it may be said, seems very doubt-

[3] Shuttleworth v. Stephens, 1 Camp. 407 (Eng.).
[4] Gray v. Milner, 8 Taunt. 739 (Eng.).

ful. Suppose No. 8 Wilmot Street were a large office building with many occupants. Obviously, there might be pronounced uncertainty about the identity of the drawee.

As an example of uncertainty, the Iowa court held that an order addressed generally "to any one by whom the drawer might be employed or who owed him money" was too indefinite and uncertain to be binding on anyone.[5]

It has been held, however, that if an instrument, otherwise in the form of a bill of exchange, except for the omission of the drawee, be accepted by anyone, it becomes valid. This conclusion is reached on the theory that the one accepting cannot deny that he was intended as the drawee.[6]

47. **Same subject—Alternative drawees.**—The Negotiable Instruments Law further provides:[7] "A bill may be addressed to two or more drawees jointly, whether they are partners or not, but not to two or more drawees in the alternative or in succession." Thus, a bill addressed "To A or B" or "To A and if he refuses, then to B," would be invalid.

Referee in case of need. A subsequent section of the statute qualifies the above rule, slightly, by providing that "The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case

[5] Dugane v. Hvezda Pokroku, 119 N. W. 141 (Iowa).
[6] 1 Parsons, Notes & Bills, pp. 288-9.
[7] N. I. L., § 128.

of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit."[8] This form of bill is said to be very uncommon in America.[9]

48. **Must contain words of negotiability.**[10]—The words usually used to satisfy this requirement are two, either order or bearer. I promise to pay "A or order," or I promise to pay "bearer," are the customary expressions.

But "order" and "bearer" are not the only words which meet this requirement. Any form of expression which indicates an intention on the part of the maker or drawer that the instrument shall be transferable will suffice. Thus, instruments made payable to "A or holder" and to "A or assigns" have been held negotiable.[11]

49. **Difference between order and bearer paper.**—Before going further it is necessary to point out briefly a fundamental and far-reaching difference between paper that is payable to order and paper that is payable to bearer.

As stated in the preceding section, words of negotiability are words which indicate an intention that the paper shall be transferable. Both order paper and bearer paper clearly indicate this intention. But there is a marked difference between the two in respect to the method by which this transfer may be effected.

[8] N. I. L., § 131.

[9] Benjamin, Chalmers' Bills, Notes, Checks, Art. 7.

[10] Maule v. Crawford, 14 Hun 193 (N. Y.), LEADING ILLUSTRATIVE CASES.

[11] Putnam v. Crymes, 1 McMul. Law 9 (S. C.); Raymond v. Middleton & Co., 29 Pa. St. 529; County of Wilson v. Nat'l Bank, 103 U. S. 770.

Paper payable to bearer may be transferred by delivery only. By the simple act of handing it over legal title passes. This follows logically from the fact that anyone who is in possession of bearer paper is within the description of it—is within the terms of the order or promise. The possessor is the bearer.

But further steps are required to complete a transfer of paper payable to order. In addition to delivery there must be indorsement. The promise to pay A or order is a promise to pay A or such person as A shall direct. Hence, without A's direction, which is called an indorsement, no one can bring himself within the terms of the promise.[12]

50. **Instrument payable to order, when.**—The answer to this question is simple. The Negotiable Instruments Law answers it briefly as follows:[13] "The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order."

It will be noticed that no distinction is made between the expression, "I promise to pay to the order of A" and "I promise to pay A or order." Both expressions mean the same thing.[14]

Likewise, as indicated above, the expression, "I promise to pay A or assigns," though this is uncommon, means the same as the promise to pay "A or order."

51. **Instrument payable to bearer, when.**—The Negotiable Instruments Law returns the following

[12] This distinction is treated at length in Chap. V.
[13] M. I. L., § 8.
[14] Durgin v. Bartol, 64 Me. 473.

comprehensive answer:[15] "The instrument is payable to bearer,

1. When it is expressed to be so payable; or

2. When it is payable to a person named therein or bearer; or

3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or

4. When the name of the payee does not purport to be the name of any person."

Subsections 1 and 2 cover the common forms and need no special elucidation. It must be borne in mind, however, that the word "bearer" need not be used. Paper payable to "A or holder" or to "A or any one to whom he may deliver it" is payable to bearer, and may be transferred by delivery, without indorsement.[16] The remaining provisions of the statute, contained in subsections 3, 4 and 5, are not so simple, and hence will be taken up separately and treated at some length.

52. **Same subject—Fictitious payee.**—A bill, note or check made payable to a fictitious payee is not only treated as negotiable, but as capable of being negotiated by delivery merely, i. e., as payable to bearer. And this result is reached in spite of the fact that such instruments are in the form of ordinary negotiable paper, payable to order. Their true character, in other words, cannot be determined by mere inspection.

[15] N. I. L., § 9. Subsection 5 of the statute is omitted here because it has to do more logically with the subject of negotiation. See § 82 of this article.

[16] Putnam v. Crymes, 1 McMul. Law 9 (S. C.),

What, then, is meant by "fictitious payee?" Probably no better general definition can be given than that contained in subsection 3 of the statute, quoted above. The expression "fictitious or non-existing person" has reference to what is in the mind of the maker of the note or drawer of the bill or check; not to actual existing facts. Thus, a living person may be fictitious or non-existing in the sense in which these words are here used. For example: If the paper is made payable to A or order, it will be treated as payable to a fictitious payee, and hence as payable to bearer, even though A is the name of a living person, provided the maker or drawer does not intend that A shall ever have any interest in the paper.

A recent Pennsylvania case furnishes a good illustration of the rule stated. A, a clerk, had a power of attorney to draw checks on the bank account of his employer, B. A fraudulently drew checks in favor of C, an existing person. C had no knowledge of nor interest in the checks and was not intended by A to receive them. A then indorsed the name of C and negotiated the checks, for his own purposes, and the bank paid them, in good faith, to the transferee. The question was then raised as to whether the bank could properly debit B's account with the money thus paid out. If these checks were to be treated as payable to order, the indorsements were forgeries and the bank would lose, for the obvious reason that a forged indorsement is no indorsement, and hence the payment would not have been in compliance with the order actually given. On the other hand, if the checks were to be treated as payable to bearer, the

bank was justified in paying them, for the indorsement was mere surplusage, not necessary for a transfer of title. The decision was in favor of the bank, on the theory that the checks were payable to a fictitious payee, and hence payable to bearer.[17]

53. **Same subject—Fictitious payee (continued).**—Examining the rule again, it will be observed that the name inserted as payee may not be the name of anyone and yet the instrument will not be treated as payable to a fictitious payee or non-existing person, and hence not as payable to bearer. This situation arises where the maker or drawer is induced to believe that the party named is a real person and is to have the bill or note.

In Armstrong v. National Bank,[18] Mrs. Armstrong drew a check on the defendant bank, payable to William Brown or order, who was represented to her by Grimes to be an actual person, and delivered the check to Grimes. Grimes indorsed the name of William Brown on it and cashed it at the bank. If this were bearer paper the bank must be protected in making the payment; if it were order paper, the bank must lose. The court held that it was order paper, saying: "The fact that the check was made payable to a person that had no existence does not alter the rights of the plaintiff (Armstrong) as against the bank, for she supposed that Brown was a real person, and intended that payment should be made to such person. The doctrine that treats a check or bill made payable to a fictitious person as one made pay-

[17] Snyder v. Corn Exch. Nat'l Bank, 221 Pa. St. 599.
[18] 46 Ohio St. 512.

able to bearer, and so negotiable without indorsement, applies only where it is so drawn with the knowledge of the parties."

54. **Same subject—Name of payee not purporting to be the name of anyone.**—A typical example of this is a check payable to "the order of cash." When the check is worded in this way it is payable to bearer.[19]

In McIntosh v. Lytle,[20] the court said: "Checks drawn payable to an impersonal payee, as to 'bills payable' or order, or to a number or order, are held to be payable to bearer, on the ground that the use of the words 'or order' indicates an intention that the paper shall be negotiable; and the mention of an impersonal payee, rendering an indorsement by the payee impossible, indicates an intention that it shall be negotiable without indorsement—that is, that it shall be payable to bearer."

The wording of the statute, however, would seem to warrant the holding that an instrument, which is payable to an impersonal payee, is payable to bearer without the addition of such words of negotiability as "order" or "bearer."

55. **Non-essentials as to form.**—The Negotiable Instruments Law provides: "The validity and negotiable character of an instrument are not affected by the fact that—

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or

[19] Cleary v. De Beck Plate Glass Co., 104 N. Y. S. 831.
[20] 26 Minn. 336.

3. Does not specify the place where it is drawn or the place where it is payable; or

4. Bears a seal."[21]

Date. It is customary to place the date of an instrument in the upper right-hand corner, but it may be placed anywhere on the paper or the date may be omitted entirely. Where the date is not given, and the instrument is payable at a certain time after date, the time is computed from the date of issue, and parol evidence is admissible to show what this date was.

It may also, as between the original parties, be shown that there was a mistake in the date. But this cannot be done to the prejudice of transferees for value, without notice. As to such, the date inserted must stand as the true date.[22]

A bill or note, undated when issued, may later be filled up by any holder with the true date, but any date inserted therein will be binding upon prior parties when the instrument is transferred to a holder in due course, i. e., a bona fide purchaser before maturity.[23]

Ante-dated and post-dated instruments. Provided there is no fraudulent purpose in so doing, bills and notes may be ante-dated or post-dated. But evidence is admissible to show the actual date of issue and the instrument takes effect from that time rather than from the date named. Thus, if a note is dated ahead and delivered to the payee, the note is

[21] N. I. L., § 6.
[22] Huston v. Young, 33 Me. 85.
[23] N. I. L., § 13.

valid and enforcible, even though the maker may die before the date inserted in the note.[24]

But an instrument ante-dated or post-dated for the purpose of evading some law will not be enforcible in the hands of anyone other than a holder in due course. It is the day of delivery that determines the validity of the instrument. So if the paper is dated on Saturday or Monday, but is in fact delivered on Sunday, it cannot be enforced by the party to whom it is delivered. On the other hand, if it is dated on Sunday, but in fact delivered on Saturday or Monday, it is enforcible.

But no presumption of invalidity or fraud is raised by the fact of negotiation before or after the date the instrument bears.[25]

56. **Same subject—Value received—Place of payment—Seal.**—The words so commonly used in bills and notes, "for value received," are not essential.[26] Nor is it necessary to specify the place where the instrument is drawn or payable. Such facts may be supplied by extrinsic evidence whenever they are material.

Bears a seal. The provision in the statute rendering the use of the seal of no effect is in conflict with the rules of the law merchant. The sealed instrument was well known to the common law and placed in a class by itself. When, therefore, a document bore the seal of the party executing it, it was thought to have its character indelibly fixed as a

[24] Pasmore v. North, 13 East 517 (Eng.).
[25] Richter v. Selin, 8 Serg. & Rawle 425 (Pa.).
[26] Mehlberg v. Tisher, 24 Wis. 607.

common law specialty, and, therefore, could not be treated as a negotiable instrument.[27] The statute thus changes the law on this point.

[27] Osborne & Co. v. Hubbard, 20 Or. 318.

CHAPTER III.

DELIVERY, CONSIDERATION, INTERPRETATION.

57. **Delivery.**—An instrument otherwise complete in every formal detail is not in any sense a legal obligation until it has been delivered.[28] A may indite an instrument embodying all of the formal requisites heretofore discussed, even to the signature, but until the further act of delivery it is a nullity. Obviously, A may destroy it, or do with it as he pleases. It has no legal inception until it has been delivered.

Delivery may be either actual or constructive. If A, after fully executing a note in favor of B, voluntarily hands it over to B, with the intention that B shall keep it, this is an actual delivery. Its inception as a negotiable instrument is complete at that moment.

What will constitute a constructive delivery is not so easy of determination. The Supreme Court of Indiana, in discussing this question in Purviance v. Jones,[29] said: "While it is not indispensable that there should have been an actual manual transfer of the instrument from the maker to the payee, yet to constitute a delivery it must appear that the maker in some way evidenced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it and

[28] Fearing v. Clark, 16 Gray 74 (Mass.), LEADING ILLUSTRATIVE CASES.
[29] 120 Ind. 162, 21 N. E. 1099.

intentionally placing it in the power of the payee or of some third person for his use. * * * The final test is, did the maker do such acts in reference to the * * * instrument as evince an unmistakable intention to give it effect and operation according to its terms, and to relinquish all power and control over it in favor of the grantee or obligee?" In the case up for decision before the court the maker had left the note at the bank, but it was not actually turned over to the payee before the maker's death. The court found that the facts adduced did not show an absolute surrender of control on the maker's part, and hence that the note had no inception.

58. **Consideration—In general.**—It is a general rule of law that no contract can be enforced unless it is supported by a legal consideration; in fact, it is not, legally speaking, a contract at all, if consideration is lacking. This fundamental rule of the law of contracts applies as well to negotiable instruments as to the ordinary common law contract. Thus, if A executes a promissory note in favor of B and makes B a present of it, B cannot recover on it.

59. **What constitutes consideration?**—A valuable consideration, as applied to the law of commercial paper, is any consideration sufficient to support a simple contract.[30] And such consideration may be defined, in general terms, to be the surrender of some legal right in the present, or the promise to surrender some legal right in the future by one person in return for the promise of the other. Thus, A

[30] N. I. L., § 25; Swift v. Tyson, 16 Pet. (41 U. S.) 1, LEADING ILLUSTRATIVE CASES.

owns a horse; he surrenders the title to B in return for B's promise to pay him $100. B's promise is supported by a valuable consideration and is enforcible. Hence, if B gives his promissory note to A in return for the horse, the note is enforcible. Likewise, if A promises, today, to convey next week a certain piece of land which he owns to B, and B in return promises to pay A $1,000 for it, the promise of each is a consideration for the promise of the other. Each has promised to do something that he is otherwise not bound to do. Each has promised to surrender a legal right in the future. This may also be applied to negotiable paper.

Thus it was held in Backus v. Spaulding,[31] that if a promissory note is made by A to B in exchange for a promissory note made by B to A, each note is a valid consideration for the other. Another not uncommon case is this: A owes B, the debt being due. B agrees to release A, provided X will execute a note in favor of B for the amount. B's release of A is a valid consideration for X's note.[32] In other words, the note is received in payment of the debt. And so illustrations might be multiplied indefinitely. The reader is referred to the law of contracts for a fuller treatment of the general law of consideration.

60. **Antecedent or pre-existing debt as consideration.**—The Negotiable Instruments Law provides: "An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time."[33]

[31] 116 Mass. 418.
[32] Harris v. Harris, 180 Ill. 157.
[33] N. I. L., § 25.

Bearing in mind the general definition of consideration, it is obvious that antecedent or pre-existing debt should constitute a valuable consideration, provided the bill or note is received in absolute payment of such original debt. Thus, if A owes B $100 for groceries and A gives his note in absolute payment of the bill, B has without doubt given value for the note. He has surrendered his legal right against A on the grocery bill. The surrender of this legal right constitutes consideration. Nor can the validity of the consideration be questioned, even though the old debt be not actually cancelled, if, in consideration of the execution or transfer of the bill or note, B should agree to *extend the time of payment* on the original debt. Again, the recipient of the instrument has yielded a right, viz., the right to enforce payment of his claim at once.

But a difficult question arises if the instrument is given as conditional payment or as security only for the past debt. The question is frequently presented in the following form: A is obligated to B in the sum of $100; A is the holder of a note against X for $200; A indorses this note and transfers it to B as security for the payment of the $100 obligation; B does not agree to extend the time of payment on the old claim. Is B in such a case a *holder for value?* In other words, has B parted with consideration for the transfer? On this question especially the courts have been in marked conflict. The mercantile view would seem to favor treating B as a holder for value, because of the fact that such transfers help to sustain credit and do in many cases result in the actual

extension of the period of credit, even though there is no express agreement for such extension. It is believed that the purpose of the statute was to render past debt consideration under such circumstances, but some courts have not thought the wording of the statute specific enough to bring about such result. Even under the Negotiable Instruments Law, therefore, the question is, unfortunately, an open one.

61. **Consideration presumed.**—The rule of the law merchant is accurately stated in the Negotiable Instruments Law as follows:[34] "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value."

The practical effect of this presumption is to shift to the obligor the duty of pleading absence of consideration, and supporting his plea in the first instance with some evidence. It is sometimes said that the *burden of proof* is shifted to the defendant, but the accuracy of this statement may be doubted. For example, if the defendant offers no evidence in support of his plea, the presumption in favor of consideration will operate and judgment will go for the plaintiff, but it is believed that, if the defendant offers some evidence to show lack of consideration, the presumption will disappear and the final burden of proof will rest on the plaintiff to show by a preponderance of all the evidence that there was in fact consideration.[35]

[34] N. I. L., § 24.

[35] Brannan, Negotiable Instruments Law (2nd ed.), p. 31; Bringman v. Von Glahn, 75 N. Y. S. 845.

62. **Law of consideration as applied to accommodation paper.**—There is one well recognized exception to the general rule, that a party to negotiable paper is not bound unless he has received consideration for his undertaking. One who executes a bill or note for the accommodation of another is within this exception. Thus, A may desire to loan his credit to B. To accomplish this he may execute a note in favor of B, receiving no consideration therefor, and say to B: "My credit is good. Sell this note to raise such money as you may need." B indorses the note and sells it to C. C may recover from A, even though he knows that A received no consideration for executing the note. The same result may be accomplished by securing A's signature to the paper in any capacity. He may become an accommodation maker, as in the case put, or an accommodation drawer, acceptor or indorser, and cannot escape liability on the ground that he has received no consideration, except as against the party whom he has accommodated.

63. **Rules of construction in case of ambiguity.**—The rules as they were developed under the law merchant are tersely summarized in the Negotiable Instruments Law as follows:[36] "Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:"

Discrepancy between words and figures. Subsec-

[36] N. I. L., § 17. This section is divided into seven subsections. For the sake of clearness, each will be commented upon in the text, as quoted, but may be identified by the designation, subsection 1, etc.

tion 1. "Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable. But if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount."

Thus, if in the upper left hand corner of a note, there is inserted "$10" and in the body of the note it reads, "I promise to pay X or order one hundred dollars," the note is treated as a note for $100.[37] On the other hand, if the body of the note had read, "I promise to pay X or order ..... dollars," the amount of the note would be determined by reference to the figures, so that, under this supposition, this would be treated as a note for $10.

Ambiguity as to interest. Subsection 2. "Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated from the date of issue thereof."

If nothing is said about interest, the instrument will draw interest at the legal rate from maturity. Since demand paper is due at once, it may be thought that a demand note would draw interest from date even though nothing were said about interest, but this is not the case. A special rule obtains to the effect that demand paper draws interest only from demand, where nothing is said about interest.[38]

But what kind of language will be construed as

[37] Smith v. Smith, 1 R. I. 398.
[38] Hunter v. Wood, 54 Ala. 71.

an express provision for interest? The usual language is "with interest at the rate of, etc." But the following expressions have been construed as the equivalent of the foregoing: the word "use" is equivalent to "interest";[39] the words, "at 10 per cent," without more, indicate that the paper is interest bearing;[40] "Int. at 6% p. a." means "interest at 6 per cent per annum."[41]

No date. Subsection 3. "Where the instrument is not dated, it will be considered dated as of the time it was issued."

64. **Same subject—Conflicting provisions.**—Subsection 4. "Where there is a conflict between written and printed provisions of the instrument, the written provisions prevail."[42]

Doubt as to whether bill or note. Subsection 5. "Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election."

Thus, it has been held that an instrument in the following form was rightfully declared on as a promissory note:

"$1000. New York 190—.
Pay to the order of Rosario Didato.
Value received and charge on account to
38 Stanton Street. Laura Rosalia."[43]

Care must be used in the application of this rule,

[39] Clane v. Chidester, 85 Ill. 523.
[40] Thompson v. Hoagland, 65 Ill. 310.
[41] Belford v. Beatty, 145 Ill. 414.
[42] Am. Express Co. v. Pinckney, 29 Ill. 392, at 410.
[43] Didato v. Coniglio, 50 Misc. R. 280, 100 N. Y. S. 466.

however, not to attempt to apply it to an instrument which cannot by any possibility be either a bill or note, i. e., which totally fails to fulfill the requirements of either. It may well be questioned if that is not what was done in the above case.

This rule applies more logically and reasonably to a case in substance as follows:

"P. 44. London, 5th August, 1833.
Three months after date, I promise to pay John Bury or order forty-four pounds. Value received.
J. B. Grutherot. John Bury.
35 Montague Place, Bedford Place."

Grutherot's name was written across the paper as an acceptance, and Bury's name on the back as an indorsement. It was held that Bury might be treated either as a drawer of a bill or as the maker of a note.[44]

Section 130 of the Negotiable Instruments Law has this further provision, which should be logically noted here: "Where in a bill, drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument at his option, either as a bill of exchange or a promissory note."

65. **Same subject—Misplaced signature.**—Subsection 6. "Where a signature is so placed upon the instrument that it is not clear in what capacity the

[44] Edis v. Bury, 6 B. & C. 433 (Eng.); 1 Daniel, Negotiable Instruments (5th ed.), § 131.

person making the same intended to sign, he is to be deemed an indorser."

This provision has been held to mean that one will be treated as an indorser only when the doubt arises from the location of the signature, and, hence, if one sign in the place of the maker's name, he cannot be treated as indorser.[45]

Joint and several liability. Subsection 7. "Where an instrument containing the words, 'I promise to pay,' is signed by two or more persons, they are deemed jointly and severally liable thereon."

This means that the holder of such a note may sue either one of the signers separately or all of the signers jointly, as he may desire.

On the other hand, by special statutory enactment, in many jurisdictions to-day, the liability may be treated as several as well as joint, where the instrument reads, "We promise to pay" and is signed by two or more persons.

66. **Ambiguous signatures.**—Four general, but primary, rules may be stated with reference to signatures. First, a bill or note is not complete without the signature of the drawer or maker. This rule was developed more at length in an earlier section.[46] Second, no one incurs liability on an instrument whose signature does not appear thereon. The law merchant, for example, recognizes no doctrine of undisclosed principal nor any power in an agent to obligate his principal by signing his own name only to the paper. Third, the signature of the maker or

[45] Germania Nat'l Bank v. Mariner, 129 Wis. 544, 109 N. W. 574.
[46] See § 11 of this article.

drawer or any other party to a negotiable instrument may be affixed by an agent. It is not necessary that the party sought to be charged on the paper shall, personally, have done the signing. But it is imperative that the signature shall have been affixed as and for the signature of the principal and with his authority. Fourth, one who assumes to sign in behalf of some one else, is not himself bound, notwithstanding his name also appears, provided the fact is disclosed that he is signing only in a representative capacity, and not for the purpose of obligating himself.

With these general rules in mind, the question of ambiguities may be entered upon. The signature attached by the maker, drawer, acceptor, or indorser in person, affords no special difficulty. To be sure, there may be some ambiguity in such cases, for example, where the party signs in an assumed or trade name, or uses some symbol out of the ordinary, such as "1.2.8." But the law is settled to the effect that such signatures are binding provided they are intended as such and parol evidence is receivable to show that they were really intended as signatures.

67. **Same subject—Signatures by agents.**—Instruments purporting to be signed by agents, or others, in a representative capacity, however, have been a source of never ending conflict and controversy. The general rules, as stated above, are agreed upon, but their application to particular cases is fraught with uncertainty.

The cases that are free from doubt will be illustrated first. The simple case is this: A B is author-

ized to execute a note for the X Co., of which he is president. He signs thus, "X Co.," or thus, "X Co. by A B, President," or "A B, President for the X Co." or "A B for X Co." In each case this is unequivocally the obligation of the X Co. and not of A B.[47]

On the other hand, if he signs merely A B, or even A B, President, it is (apart from other disclosures, discussed in the next section) treated as the personal obligation of A B and cannot by any possibility be treated as the obligation of the X Co., although it was so intended. This is true because the signature of the company is in no sense affixed.[48] The word "President," added, is considered merely a description of the person. Likewise, a signature in the form "A B, Agent," "A B, Trustee," etc., is the personal signature of A B.

But suppose the signature is "A B, President X Co." Is this the note of A B personally, the expression, "President X Co." being a mere description, or is it the obligation of the "X Co.," signed by its president, as agent? The New Jersey court[49] said it was ambiguous and could be explained by parol evidence; but the Massachusetts court[50] said that a note executed in this form was the note of A B, personally, and no evidence could be received to change this construction. Again in a recent Wisconsin case,[51] the instrument was in the following form:

[47] Huffcut, Agency (2nd ed.), § 190.
[48] Huffcut, Agency (2nd ed.), § 190.
[49] Reeve v. First Nat'l Bank, 54 N. J. L. 208, 23 Atl. 853.
[50] Tucker M'f'g Co. v. Fairbanks, 98 Mass. 101.
[51] Germania Nat'l Bank v. Mariner, 129 Wis. 544.

"The X Company promises to pay ...." Signed, "A B, Treas.," and underneath this signature was the name, "C D." C D was, in fact, secretary of the company and intended to sign as such. The court held that the instrument was ambiguous as to whether C D signed in his individual capacity or for the company and permitted him to show that he intended to sign for the company and thus to escape personal liability. The court further held that, since this ambiguity was evident, the explanation could be urged against any one into whose hands the instrument might come.

There are thus two lines of authority with reference to ambiguous signatures: one holding that if it is not clear on the face of the instrument whose the signature is intended to be, and it is so worded and signed that it may be treated as the obligation of either the principal or the agent, extrinsic evidence may be heard to remove the ambiguity; the other, as indicated by the Massachusets case, holding that the construction must be reached from what appears on the instrument alone. It is believed that the former is the prevailing view.[52]

68. **Same subject—Disclosure of agency by signer.**—It does not follow, however, in every case where the signature is not such as to bind the principal, that the agent will be personally bound. There is substantial authority to the effect that, if the agent discloses the fact that he is signing solely in a representative capacity and not for the purpose of making the obligation his own, the instrument will

[52] Dunbar Box & Lumber Co. v. Martin, 103 N. Y. S. 91; see note 50.

not as against any person taking it with that knowledge and understanding be personally binding upon the signer. But a difficult question arises in determining what will be considered a sufficient disclosure.

In some jurisdictions it is held that "where there is any indication by word or description or otherwise, that the person signing the paper signed as agent for another, parol evidence may be admitted in an action between the original parties, or those who took the paper with full knowledge of the circumstances attending its execution, in order to show the actual understanding of such original parties."[53] In other jurisdictions, the construction must be reached from an inspection of the paper alone. Thus, in some states, the signature, A B, Agent, or A B, Agent of X, cannot be explained by parol even as between the original parties to the instrument. In other states, A B may escape personal liability by showing that the payee or present holder knew it was not intended as and for his personal obligation.[54]

The Negotiable Instruments Law provides as follows:[55] "Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent or as filling a representative character, without disclosing his principal, does not exempt him from personal liabil-

[53] Huffcut, Agency (2nd ed.), § 189.
[54] Metcalf v. Williams, 104 U. S. 93.
[55] N. I. L., § 20.

ity." The last clause of this provision apparently does not settle the conflict as to methods of disclosure.

The first clause in this section of the statute, by inference, renders an agent liable on the instrument, even though the signature be clearly and unequivocally that of the principal, if he is acting without authority. If this is the proper construction, it is contrary to the rule established by the great weight of authority prior to the statute. The majority rule prior to the statute was that one so signing without authority was liable, not on the instrument, but for a breach of warranty of authority.[56]

69. **Incomplete instruments.**—Instruments issued incomplete in form, that is, with blanks as to some of the material portions, have occasioned no little difficulty in the law. The case of an instrument in the form of a promissory note, but with the amount left blank at the time it is delivered, is typical. For example: A executes a note in favor of B or order for ..... dollars, and delivers it to B with the understanding that B may fill it in for any amount, not to exceed $500. Now as against B, A's rights are undisputed. He will not be liable to B if the instrument is filled up for any amount in excess of $500.

But suppose B fills it up for $800, and then indorses it to C before it is due in payment for a piece of land or any valuable consideration. C sues A on this note for $800. Whether A will be liable to C for $800 or any amount now depends upon what a further

[56] White v. Madison, 26 N. Y. 117.

investigation may reveal. First, suppose C knew that B had no authority to fill in the note for any amount in excess of $500. In that event C's rights are no better than B's. He cannot recover. Second, suppose C did not know that the note was issued to B with the amount left blank, but presumed that it was complete when issued. Again, the answer is clear. All agree that C can recover the full amount.[57] Third, but suppose C knew that the note was issued in blank, but did not know that any limit was placed upon B's authority to fill it in. This case is not so easy of solution, and it has not always been decided in the same way. Some authorities in the United States have held that in such a case C takes the paper at his peril, if he fails to investigate carefully B's authority.

This was also the rule in England followed prior to the Bills of Exchange Act as laid down in Hatch v. Searles.[58] But Lord Mansfield had prior to that case held otherwise, saying, that the issuance of paper with the amount left blank was "a letter of credit for an indefinite amount." Daniel,[59] in reviewing the authorities, maintains that Lord Mansfield's view is the better of the two, concluding thus: "The paper being limitless in its terms, is prima facie limitless as to the authority it confers. The holder is invested with a general authority as to the paper, and the graphic phrase of Mansfield describes it to perfection. High authorities, including Story and

[57] Merritt v. Boyden & Son, 191 Ill. 136.
[58] 2 S. & G. 147 (Eng.).
[59] 1 Daniel, Negotiable Instruments (5th ed.), § 147.

Parsons, concur in these views, which seem to us clearly most philosophical."

70. **Same subject—General rule and statute.**—The general rule in the United States is in accord with the view thus expressed by Mansfield and approved by Daniel, that is, that knowledge on the part of the transferee that the paper was issued in blank is immaterial, so long as he does not know that limitations were imposed and exceeded. Thus in the case supposed, generally in this country, C would be protected for the full amount.[60]

The Negotiable Instruments Law provides[61] that: "Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. * * *" It would seem that this is in accord with the general rule as it existed prior to the statute.

71. **Same subject—A further provision of the statute.**—An additional question of importance arises under this section of the statute[62] which further provides that, "If any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands. * * *"

[60] Stanley v. Davis, 107 S. W. 773 (Ky.); Snyder v. Van Doren Imp., 46 Wis. 602, LEADING ILLUSTRATIVE CASES.

[61] N. I. L., § 14.

[62] N. I. L., § 14.

This protects C in the case last supposed without doubt. But what can be done under the statute in the following case? Suppose A, at B's request, executes a note in favor of C, directly, but with the amount left blank. B then fills in an amount in excess of the sum authorized and delivers it to C for a valuable consideration, C being ignorant of B's misconduct. The statute says a "holder in due course" to whom the paper has been "negotiated" will be protected.

The contention is made that C is the "payee," and that the instrument is "issued," not negotiated, to the "payee," and that the word "negotiated" limits the operation of the statute to "indorsees." The statute has been construed both ways, so that this question is generally an open one.

The Massachusetts court held that C would be protected.[63] The Iowa court held that C could not be protected.[64] The question is set at rest in Illinois by the different wording of the statute, which provides that a holder in due course to whom the paper is "issued or negotiated" after completion will be protected.[65]

[63] Boston, etc., Co. v. Steuer, 183 Mass. 140.

[64] Van der Ploeg v. Van Zuuk, 135 Ia. 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490.

[65] Ill. Rev. Stats., chap. 98, § 32.

CHAPTER IV.

ACCEPTANCE.

72. **Meaning.**—The acceptance of a bill of exchange is the signification by the drawee of his willingness to be bound by the order of the drawer; that is, by his acceptance the drawee binds himself to pay the bill according to its tenor. Prior to acceptance, the drawee is in no sense an obligated party on the instrument.[66] By his acceptance he steps, practically, into the position of the maker of a promissory note, and the drawer of the bill occupies substantially the position of the indorser of a note.

73. **Form of acceptance.**—The acceptance of a bill of exchange may be either an express, otherwise known as formal, acceptance, or constructive, i. e., implied from conduct.

The express or formal acceptance may be either written upon the bill, written upon a separate paper, or written upon a separate paper and be in the form, merely, of a promise to accept a bill to be later drawn.

An oral acceptance, while at one time common and valid both in England and the United States,[67] has in recent years been done away with by statute. The Negotiable Instruments Law expressly provides that "the acceptance must be in writing and signed by the drawee."[68]

[66] Luff v. Pope, 5 Hill 413 (N. Y.), LEADING ILLUSTRATIVE CASES.
[67] Allen v. Leavens, 26 Or. 164, 46 Am. St. 613, 26 L. R. A. 620.
[68] N. I. L., § 132.

The customary way for the drawee to accept a bill is to write the word "accepted" on the face of the bill and place his signature under it. About such acceptance there has never been any question.

It is not imperative, however, that the word "accepted" be used. Any word of similar import will suffice, such as "presented," "seen," "honored," and "payment guaranteed."[69] Under the law merchant, apart from statute, an acceptance was good without the signature.[70] The Negotiable Instruments Law expressly requires the signature, but the requirement both of "writing" and "signature" seems to be satisfied by the signature alone. In Spear v. Pratt,[71] it was held that a bill, across the face of which was the signature of the drawee, without other writing, was "an acceptance in writing and signed."

74. **Same subject—Acceptance on separate paper.** —It was not required by the law merchant, nor is it required by the Negotiable Instruments Law, that the acceptance in writing be on the bill itself. It may be on a separate paper and may relate to an existing bill or a bill thereafter to be drawn. Two sections of the statute deal with such acceptances, and state the general rules of the law merchant.

The first provides:[72] "Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor, except in favor of a person to whom it is shown and who, on the faith thereof,

[69] Tiedeman, Commercial Paper, § 223.
[70] Phillips v. Frost, 29 Me. 77.
[71] 2 Hill 582 (N. Y.), LEADING ILLUSTRATIVE CASES.
[72] N. I. L., § 134.

receives the bill for value." A, for example, writes a letter to B, saying "I have drawn a bill on you for $100 in favor of C, and should like to know if you will accept it." B replies, by letter, "I will accept the bill which you have drawn upon me in favor of C for $100." A shows this letter to C, and C takes the bill in payment for merchandise sold by C to A. This letter of B operates as an acceptance in favor of C. C still has a right to have B write his acceptance on the bill itself, but it is not necessary for him to do so. B is bound by his letter.[73] In some states, prior to the statute, it was held that such an acceptance was binding regardless of whether it was communicated to the holder at the time of taking the bill.[74]

The next section of the statute[75] adds the following provision: "An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value." The rule here stated was a well settled rule of the law merchant prior to the statute.[76] In order, however, for such a promise to operate as an acceptance, it is required, first, that the bill be drawn within a reasonable time after the promise is made,[77] and second, that the promise describe the bill so that there can be no doubt of its application to the bill in question. This second requirement does not mean,

[73] Daniel, Negotiable Instruments (5th ed.), § 550.
[74] Jones v. Council Bluffs, etc., Bank of Iowa, 34 Ill. 313.
[75] N. I. L., § 135.
[76] Coolidge v. Payson, 2 Wheat. 66 (U. S.), LEADING ILLUSTRATIVE CASES.
[77] Wilson v. Clements, 3 Mass. 1.

however, that the promise must describe the intended bill with great particularity. The promise to accept all bills that might be drawn for a specific purpose is sufficient.[78]

75. **Same subject—Acceptance by conduct.**—This presents an anomalous situation. A, the holder of a bill, presents it to B, the drawee, for acceptance. The law allows the drawee twenty-four hours in which to decide whether he will accept. Now if B at the end of the twenty-four hours (unless further time is expressly granted) refuses to accept the bill and also refuses to return it, he may be held liable as an acceptor. This rule, while hard to sustain on theory, was so well established by the law merchant that it was incorporated in the Negotiable Instruments Law, and is sustained on the ground that it is considered by bankers to be a practical working rule.

Or suppose B intentionally destroys the bill; this, too, is treated as an acceptance. This rule of the law merchant is also included in the section of the statute above referred to. The statute provides as follows:[79] "Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such further period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same."

A question has been raised as to what is meant

[78] Nelson v. First Nat'l Bank, 48 Ill. 36.
[79] N. I. L., § 137.

by a refusal to return. Is a mere failure to return sufficient, or must there be an express refusal? In Wisconsin the statute as adopted expressly provides that the "mere retention of the bill is not an acceptance." In New York, an earlier statute, worded like the provisions of the Negotiable Instruments Law, was construed to mean that a mere failure to return was not the same as a refusal to return and hence could not be treated as an acceptance.[80] But under the section of the Negotiable Instruments Law above quoted the New York court has held that a mere failure to return constitutes an acceptance.[81] The Pennsylvania court has placed a similar construction upon this provision of the statute.[82] The law is thus decidedly in confusion on this point.

76. **Kinds of acceptances—In general.**—An acceptance may be either general or qualified. The general acceptance is the plain and absolute acceptance of the bill as it is drawn. A orders B to pay a certain sum of money to the order of C on a certain date. If B accepts this bill generally, he simply signifies his willingness, in one of the ways above indicated, to do exactly as A has ordered him to do. The only change that he can make and still have his acceptance treated as a general acceptance is to indicate the place where the bill shall be paid by him. And even this is not permissible if it is expressly made to appear that it is payable there and not elsewhere.[83]

[80] Matteson v. Moulton, 11 Hun 268 (N. Y.); Dickinson v. Marsh, 57 Mo. App. 566.

[81] State Bank v. Weiss, 46 Misc. Rep. 93, 91 N. Y. S. 276.

[82] Wisner v. First Nat'l Bank, 220 Pa. St. 21, 68 Atl. 955, 17 L. R. A. (N. S.) 1266.

[83] N. I. L., § 140; 1 Daniel, Negotiable Instruments (5th ed.), § 520.

The qualified acceptance is one which varies from the tenor of the bill as drawn. It has been a source of trouble and legal controversy.

Such an acceptance the holder is not bound to receive. He may, if he chooses, treat the bill as dishonored, if the drawee refuses to accept the bill as drawn. On the other hand, it is the privilege of the holder to take the qualified acceptance, but by so doing he runs the risk of losing all rights against the drawer and previous indorsers, if any. In the words of the Negotiable Instruments Law:[84] "Where a qualified acceptance is taken the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assented thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto." The only certain right which the holder has, therefore, on a qualified acceptance is his right against the acceptor on such promise as the acceptor makes.

77. **Same subject—Qualified acceptance.**—The Negotiable Instruments Law codifies prior rules briefly as follows:[85] "An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated."

[84] N. I. L., § 142.
[85] N. I. L., § 141.

In Smith v. Abbot,[86] the drawee accepted a bill of exchange to pay it when goods assigned to him and for which the bill was drawn were sold. The court held that this acceptance was binding upon the acceptor, but that the holder might have refused this acceptance and treated the bill as dishonored.

2. "Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn."

In an early English case it was held, that the acceptance was thus qualified which was in the following form: "I do accept this bill to be paid, half in money and half in bills."[87]

3. "Local, that is to say, an acceptance to pay only at a particular place."

4. "Qualified as to time." In Russell v. Phillips,[88] the court said, "The bill as drawn called upon him (the drawee) to pay in money on the 28th of May, 1840, but it was competent to him by his acceptance to extend the time of payment, subject to an option in the holder to take such acceptance and agree to such alteration, or to treat the bill as dishonored for non-acceptance."

5. "The acceptance of some one or more of the drawees, but not of all." For example, a bill is drawn, addressed to A and B, as drawees. A accepts, but B does not. This is a qualified acceptance. It binds A only and operates to discharge all prior non-assenting parties.[89]

78. **Who may accept.**—The primary rule is that

[86] 2 Strange 1152 (Eng.).
[87] Petit v. Benson, Comberbach 452 (Eng.).
[88] 14 Q. B. 891 (Eng.).
[89] Smith v. Milton, 133 Mass. 369, at 371.

no one but the drawee may accept a bill of exchange. Thus if a bill is addressed to B, and C writes across the face of the bill, "accepted," signed "C," the attempted acceptance by C is no acceptance.[90]

But this general rule is subject to one well established exception. One, other than the drawee named, may accept "for honor," or "supra protest," as it is often called. A draws a bill on B in favor of C. C presents the bill to B and B refuses to accept it. C protests it for non-acceptance. It is then allowable for a stranger to the bill, D, with C's consent, to accept the bill for the honor of A, the drawer. Or if the bill contains indorsements, at the time it is dishonored, the acceptance by D may be for the honor of some indorser. The purpose of such an acceptance is to dissuade the holder from going back on the prior parties at once and demanding payment from them. It may be that when the time for payment arrives the drawee will be willing to make payment, in which event the credit of the drawee is saved and the drawer or indorser is protected from loss.

79. **Same subject—Acceptance for honor.**—The Negotiable Instruments Law contains, among others, the following provisions relative to acceptance supra protest or for honor:[91] "Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security, and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and

[90] Davis v. Clarke, 6 Q. B. 16 (Eng.), LEADING ILLUSTRATIVE CASES.
[91] N. I. L., §§ 161, 162, 163, 164.

accept the bill supra protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

"An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

"Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

"The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted."[92]

[92] Hoare et al. v. Cazenove et al., 16 East 391 (Eng.).

CHAPTER V.

NEGOTIATION AND INDORSEMENT.

80. **Negotiation—In general.**—The Negotiable Instruments Law provides:[93] "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof." In other words, negotiation is the process by which title to negotiable paper is transferred. And one may be said to have title to a bill or note when he has possession of it, is within the description of it, and hence is in a position to sue on it in his own name. In negotiating it, therefore, enough must be done to put the transferee in this position.[94]

But the fact that one, other than the original payee, can receive title to negotiable paper and sue on it in his own name does not mean necessarily that he can recover on it. Defenses good as between the prior parties may still be asserted unless the transferee is not only a holder, but also what is termed a holder in due course. The subject of holder in due course will be treated fully in a subsequent chapter.[95]

81. **Negotiation by delivery—Paper originally payable to bearer.**—Negotiable paper payable to bearer may be negotiated by delivery alone. Each one to whom such paper is delivered is within the

[93] N. I. L., § 30.

[94] Hull v. Conover's Executors, 35 Ind. 372, LEADING ILLUSTRATIVE CASES.

[95] See Chap. 6.

description of it. This is obviously so where the instrument reads, "I promise to pay bearer." But it is no less true in legal effect when it is payable to "A or bearer," or to a fictitious payee, or to an impersonal payee, for, as pointed out in earlier sections, all such instruments are payable to bearer.

Nor is the character of such paper changed, nor its transfer by simple delivery precluded, by a subsequent special indorsement. For example, if a note is payable to bearer, and thereafter some holder thereof indorses it "Pay B or order," and delivers it to B, it may, notwithstanding this indorsement, be further negotiated by delivery. B's indorsement is not required, as it would be if the instrument were originally made payable to B or order.[96]

In this regard the Negotiable Instruments Law codifies the law merchant as follows:[97] "Where an instrument, payable to bearer, is indorsed specially, it may, nevertheless, be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement."

82. **Same subject—Paper indorsed in blank or to bearer.**—If a bill or note is made payable on its face to "A or order" and A writes on the back of it, "Pay bearer" and signs his name, or merely signs his name, without more, from this time on, as long as the paper remains in this condition, it is payable to bearer and title will pass to it by delivery. In other words, by an indorsement in blank or specially to

[96] See §§ 51, 52, 53 and 54 of this article.
[97] N. I. L., § 40.

bearer, the character of the instrument is changed from order paper to bearer paper[98] and may be negotiated as such. The same result is reached in any case where the last indorsement, if there be more than one, is of the character above described.[99] So, if, in the case put, A, after indorsing as indicated, should deliver the instrument to B, and B to C, C would have title. Then if C should indorse it "Pay D or order" and deliver it to D, and D indorse it in blank and deliver it to E, then E in turn could vest the legal title in F by the bare act of delivery, since the last indorsement would be an indorsement in blank. So long, therefore, as the only or last indorsement is in blank or to bearer specifically, the instrument may be negotiated in the same manner as paper originally payable to bearer.

83. **Same subject—Doctrine of Smith v. Clarke.**—Thus far the law is well settled. But suppose a note payable on its face to A or order is indorsed in blank by A and delivered to B, and B in turn indorses it, "Pay to C or order," signs his name thereunder, and delivers it to C. Then may C negotiate it to D by delivery without indorsing it? The question thus presented, in general terms, is, does the character of the paper when once changed by an indorsement in blank remain unaltered by a subsequent special indorsement? It was observed in the previous section that paper, originally payable to bearer, may be further negotiated by delivery, notwithstanding

[98] Mass. Nat'l Bank v. Snow, 187 Mass. 159; Unaka Nat'l Bank v. Butler, 113 Tenn. 574.

[99] N. I. L., § 9, subsection 5.

it be subsequently specially indorsed. Does the same rule apply to paper originally payable to order, but indorsed in blank by the payee and then subsequently specially indorsed? In 1794 Lord Kenyon, in the leading case of Smith v. Clarke,[1] returned an answer in the affirmative, holding, in the case supposed, that D by delivery received title, and the rule of this case became the established rule in this country.[2]

The effect of the Negotiable Instruments Law. The effect of the statute upon the rule of the law merchant, as thus established, is a debatable question. It is contended by some that the purpose of the statute was to abrogate the rule of Smith v. Clarke and to make the last indorsement of paper, originally payable to order, control the character of the paper. If this contention is correct, then, under the statute, in the case last supposed, D could not get title without C's indorsement, in addition to the act of delivery. This result is reached by limiting the application of § 40 of the statute, above quoted, to paper originally payable to bearer, thus subjecting paper originally payable to order exclusively to § 9, subsection 5, which provides that paper is payable to bearer, "When the only or *last* indorsement is an indorsement in blank."[3] Inasmuch as the doctrine of Smith v. Clarke is open to serious objection on principle, it is to be hoped that this construction of the statute will prevail.

84. **Negotiation by indorsement and delivery—Paper payable to order.**—Paper payable on its face

[1] Reported in Peake, 225.

[2] Watervliet Bank v. White, 1 Den. 608 (N. Y.).

[3] Brannan, Negotiable Instruments Law (2nd ed.), pp. 12, 15 and 46.

to A or order requires the indorsement of A, in addition to delivery, to complete the transfer thereof.[4] Without A's indorsement no one but A can maintain an action in his own name. This does not mean, however, that A must personally do the indorsing. The indorsement may be made by an authorized agent. In case of A's death the indorsement may be made by A's administrator or executor, and in case of the bankruptcy of A the transfer may be made by A's assignee.[5]

85. **Indorsement—Usual form.**—The customary form of indorsement is made by writing the name across the back of the instrument, without more, or under such words as "Pay B or order." The latter form of indorsement is used when it is desired to continue the character of the instrument as payable to order; the former, when it is desired to make the paper payable to bearer.

86. **Indorsement in the form of assignment.**—But suppose a note is payable to A or order and A, instead of using the usual form of indorsement, writes on the back of the note, "I hereby *assign* the within note to B or order," signs his name thereunder, and delivers the note to B. What effect is to be given to this method of indorsing negotiable paper? The law in general has been in great conflict. In some states it is treated as an indorsement in the ordinary form, that is to say, it is held that not only does it operate to transfer title, but also to subject A to liability as an indorser.[6] This result is reached

[4] Hull v. Conover's Exrs., 35 Ind. 372, LEADING ILLUSTRATIVE CASES.

[5] 1 Daniel, Negotiable Instruments (5th ed.), § 680.

[6] Hall v. Toby, 110 Pa. St. 318, LEADING ILLUSTRATIVE CASES.

on the theory that the effect of an indorsement in the usual form, with delivery, is two-fold: first, it operates as a transfer of title by assignment, and, second, it subjects the indorser to liability upon his contract of indorsement.[7] These terms are implied by the law merchant when the indorser simply writes his name on the instrument. Hence, it is argued that expressing the assignment portion of the contract neither adds to nor detracts from the legal effect of A's signature.[8] On the other hand, it has been held that, while such an indorsement is sufficient to transfer title and constitute the transferee the holder of the paper, it does not subject the indorser to any liability on his contract of indorsement. In other words, it is treated as an indorsement "without recourse."[9] In the Arkansas case the court said: "* * * It seems clear to us that the payee, by expressing one only of the implications which the law attaches to an indorsement in blank or in full, in the regular way, and that one, too, not imposing any personal liability upon him, excludes every other."[10]

87. **Indorsement in form of guaranty.**—Suppose a note is made payable to A or order, and A indorses on the back of it, "I hereby guarantee the payment of the within note," and delivers it to B. Does this

[7] See Liability of Indorser, § 133 of this article.

[8] 1 Daniel, Negotiable Instruments (5th ed.), § 688c; Markey v. Corey, 108 Mich. 184, 36 L. R. A. 117. But see Gale v. Mayhew, 161 Mich. 96, 125 N. W. 781, distinguishing an indorsement in the form, "I hereby assign my interest in this note," and holding that such indorsement did not even pass title.

[9] Spencer v. Halpern, 62 Ark. 595.

[10] The N. I. L. does not settle this conflict. But see Ill. Rev. Stats., chap. 98, § 49.

constitute a negotiation of the note to B? In Trust Company v. National Bank,[11] the court, in passing upon this question, said: "That a guaranty is not a negotiation of a bill or note as understood by the law merchant, is certain," and concluded that B was in no better position than the assignee of a chose in action. The weight of authority is apparently in accord with this case, but there are substantial decisions holding to the contrary, that such an indorsement is sufficient for a complete negotiation of the instrument.[12]

88. **Indorsement must be written on the instrument or allonge.**—Contrary to the old rules with reference to the acceptance of a bill of exchange, an oral indorsement, either of a bill or note, has never been recognized. And not only must the indorsement be written, but it must be written on the instrument itself or on some paper attached to the instrument.[13] A paper thus attached is called an *allonge*. But the indorsement is not required to be on any particular part of the instrument. It may even be on the face of the instrument.[14] The usual place, however, is on the back and left end of the paper, or immediately under any prior indorsements.

Indorsements on attached paper have not been free from controversy. If the back of the instrument is filled before an attached paper is used no question

[11] 101 U. S. 68, at 70.

[12] Dunham v. Peterson, 5 N. Dak. 414. Ill. Rev. Stats., chap. 98, § 49, especially validates such indorsements. The N. I. L. is silent as to their effect.

[13] French v. Turner, 15 Ind. 59, LEADING ILLUSTRATIVE CASES.

[14] Herring v. Woodhull, 29 Ill. 92.

is raised, but there is a conflict of authority as to whether such an indorsement is effective if there is still room on the back of the instrument itself for further signatures. In Osgood's Admrs. v. Artt,[15] the court said: "That device had its origin in cases when the back of the instrument had been covered with indorsements, or writing, leaving no room for further indorsements thereon. But, perhaps, an indorsement upon a piece of paper, attached in the manner indicated, would now be deemed sufficient to pass the legal title, although there may have been, in fact, room for it on the original instrument." But the Supreme Court of Missouri refused to recognize an indorsement on an attached paper in a case where there was still room on the back of the instrument itself.[16]

89. **Indorsement must be of entire instrument.**—The law has never allowed a creditor to divide the claim which he holds, where the claim is entire. If A executes his note in favor of B for $500, it would be decidedly unfair to A to require him to pay part of the note to X and part to Y, and thus put A in a position where he might be subjected to two separate suits on the same obligation. Hence, B is not allowed to indorse such a note: "Pay X or order $250 and Y or order $250," nor even "Pay X or order $250," leaving the right to the balance in himself.[17]

But if A has paid part of the note, it may thereafter be indorsed as to the balance.[18]

[15] 17 Fed. 575.
[16] Bishop et al. v. Chase, 156 Mo. 158, at 173.
[17] Hughes v. Kiddell, 2 Bay 324 (S. C.).
[18] N. I. L., § 32.

90. **Indorsement where the instrument is payable to two or more payees.**—If an instrument is made payable to A and B or is indorsed payable to A and B, it cannot be negotiated without the indorsement of both A and B. An indorsement by A alone could at most transfer his interest in the paper, and to permit this would be to allow a division of the obligation entered into by the maker.[19]

If, however, A has authority to indorse for B, he may negotiate the instrument by signing both his own name and B's name on the paper. But no presumption of such authority arises from the fact that they are joint payees. Also, if A and B are partners, either may indorse for both.[20]

91. **Indorsement where the instrument is payable to cashier.**—The Negotiable Instruments Law provides:[21] "Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer."

The rule herein stated was applied generally prior to the statute to banking corporations.[22] The effect of the statute, therefore, is merely to place other corporations on the same footing as the banking corporations were formerly. Thus, if a note is made payable to "A. B., Cashier," and A. B. is in fact

[19] Dwight v. Pease, 3 McLean 94, 8 Fed. Cas. 187.
[20] Ryhiner v. Feickert, 92 Ill. 305; N. I. L., § 41.
[21] N. I. L., § 42.
[22] 1 Daniel, Negotiable Instruments (5th ed.), § 687.

cashier of the "X Bank," an indorsement in the form "A. B., Cashier," not only operates to transfer title to the note, but also to bind the "X Bank" as indorser. It is treated as the indorsement of the bank and not as the personal act or obligation of A. B.[23]

It should be observed that this result can be reached under the statute only in case the instrument is made payable to the "fiscal officer" of the corporation. Hence, a note made payable to "C. D., President," would be treated as belonging personally to C D., and an indorsement by him as "C. D., President," would impose personal liability on him. In such case the word "President" is a mere description of the person.[24]

92. **Indorsement where name is misspelled.**— Since a name is only a means of designating a particular individual, and since it is the individual and not the name that holds and exercises the rights, and since, further, one may assume any name he pleases in the transaction of business, it would seem to follow that a mere mistake in the spelling of a name, or the insertion of a wrong initial, or even a total mistake in name, ought not to affect the rights of the individual. Hence, if a check is made payable to John A. Smith, whereas the party's name is in fact John K. Smith, or even James K. Smith, the instrument belongs to and may be indorsed by the indi-

[23] Johnson v. Buffalo Center State Bank, 134 Iowa 731, 112 N. W. 165.

[24] Hately v. Pike, 162 Ill. 241. But see Griffin v. Erskine, 131 Iowa 444, 109 N. W. 13, where a draft made payable to "A. B., President," was treated as payable to the bank, it appearing that he was authorized by the directors to perform the duties of *cashier*.

vidual for whom it is intended. He should indorse, however, in the name by which he is designated in the check, adding, thereunder, his correct name, if he so desires.

This form of indorsement is often used in the business world where the paper happens to be made out to one using only his initials, such as J. K. Smith, whereas his usual business signature is James K. Smith. In such case the careful business man will indorse both the name "J. K. Smith" and under that "James K. Smith."[25]

93. **Indorsement by an infant.**—The general rule of law is thoroughly established, that an infant is without capacity to contract. In view of this, what effect can be given to the attempted transfer by an infant of negotiable paper by indorsement? It is well settled that no liability can be imposed upon the infant as an indorser. But a further question remains as to whether such indorsement operates to transfer title.

Story states that the law is as follows: "It seems now well settled that the indorsee, by such transfer and indorsement, acquires a good and valid title to the note against every other party thereto, except the infant, since it is not a void, but a voidable, title only. The infant may, indeed, avoid it, and intercept the payment to the indorsee, or, by giving notice to the antecedent parties of his avoidance, furnish to them a valid defense against the claims

[25] N. I. L., § 43. But see Bolles v. Stearns, 11 Cush. 320 (Mass.), in which it was held that a note made out to *John* P. Reed could not be indorsed by Joseph P. Reed, notwithstanding he was the person for whom it was intended. The case seems wrong.

of the indorsee. But, until he does so avoid it, the indorsement is deemed, in respect to such antecedent parties, as a good and valid transfer."[26]

The Negotiable Instruments Law provides as follows:[27] "The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon."

94. **Kinds of Indorsements.**—Indorsements are classified as: 1. Blank; 2. Special; 3. Restrictive; 4. Qualified; 5. Conditional.

Blank and special indorsements, being the ordinary forms, have been heretofore discussed. If a note or bill is made payable to A or order and A writes his name on the back of it, without more, it is called an indorsement in blank, the effect of which, as previously pointed out, is to make the paper payable to bearer. But if, in the case just supposed, A should write on the back of the instrument, "Pay B or order," it would be termed a special indorsement, and would require B's indorsement before it could be negotiated. The blank indorsement may also be converted into a special indorsement by the transferee by filling in his own name or the name of someone to whom he desires to transfer it, above the signature of A.

95. **Restrictive indorsements.**—The Negotiable Instruments Law defines restrictive indorsements as

[26] Story, Promissory Notes (7th ed.), § 80; Nightingale v. Withington, 15 Mass. 272.

[27] N. I. L., § 22.

follows:[28] "An indorsement is restrictive, which either—

1. Prohibits the further negotiation of the instrument; or

2. Constitutes the indorsee agent of the indorser; or

3. Vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive."

And the next section of the Negotiable Instruments Law[29] prescribes the effects of restrictive indorsement in the following language: "A restrictive indorsement confers upon the indorsee the right—

1. To receive payment of the instrument;

2. To bring any action thereon that the indorser could bring;

3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so. But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement."

96. **Same subject—Indorsement prohibiting further negotiation.**—If an instrument payable to A or order is indorsed "Pay B only," further negotiation is precluded. Any further attempt at transfer could operate only to put the transferee in the position of the assignee of a chose in action. And even as to B, it seems, the presumption is indulged that he is only

[28] N. I. L., § 36.
[29] N. I. L., § 37.

an agent for A, but this may be rebutted by showing that it was intended to convey absolute title to him.[30]

If, however, the indorsement reads "Pay B," omitting the word "only" and all other words of similar import, the indorsement is not restrictive. In other words, the mere omission of words of negotiability such as "order" or "bearer," from an indorsement, does not change the character of the paper nor affect the further negotiation of it. The indorsement "Pay B" is treated just like the special indorsement "Pay B or order."[31]

97. **Same subject—Indorsement constituting indorsee agent of indorser.**—This form of indorsement is most commonly used when negotiable paper is deposited with or forwarded from one bank to another for collection. For example: A bill is made payable to the order of the A Bank. The A Bank desires to send the bill to another city to be collected. It indorses the bill as follows: "Pay B Bank or order, for collection." This indorsement constitutes the B Bank the agent of the A Bank. By it, legal title passes to the B Bank, but this title is not an absolute title. It must be held and dealt with for the benefit of the A Bank. Strictly speaking, the B Bank is trustee of the bill for the A Bank.[32]

The further and more important effect of this form of indorsement is to charge anyone to whom the bill may be subsequently indorsed with notice of the

[30] Power v. Finnie, 4 Call 411 (Va.).

[31] Leavitt v. Putnam, 3 N. Y. 494.

[32] The courts do not always say that *title* passes, but this seems to be the more accurate way to express it. In fact the courts generally say that B does not have title; that he is a mere agent.

rights of the A Bank.[33] Hence, if the B Bank indorses the bill in question and forwards it to the C Bank, as is often done, the money collected on it by the C Bank takes the place of the paper, and, in contemplation of law, belongs to the A Bank. On this theory it has been held that the A Bank may sue the C Bank directly for money had and received to its use.[34] And, obviously, the C Bank could not apply the money collected on such a bill in liquidation of a claim owing to it from the B Bank.

Since the indorsee under this form of indorsement is within the description of the instrument, that is, is the holder thereof, the indorsee may sue in his own name. But since the action is for the benefit of the party originally so indorsing the paper, any defense that could be set up against such original party may also be set up against the indorsee who is suing. Thus, if A indorses to B "for collection," B may sue, but any defense good against A is also available against B.[35] But under no circumstances can an indorsee under this form of indorsement sue the indorser. To allow such a proceeding would merely result in circuity of action, for the money when recovered would belong in reality to the indorser and not the indorsee, and in case of recovery, from whatever source, would be immediately claimed by him. The short cut is therefore taken and no recovery allowed against the indorser.[36]

[33] Claflin v. Wilson, 51 Iowa 15, LEADING ILLUSTRATIVE CASES.

[34] Central Railroad Co. v. First Nat'l Bank of Lynchburg, 73 Ga. 383.

[35] Smith v. Bayer, 46 Or. 143, 79 Pac. 497. But see Rock Co. etc. Bank v. Hollister, 21 Minn. 385, holding that such indorsee cannot sue in his own name.

[36] White v. National Bank, 102 U. S. 658.

98. **Same subject—Indorsement constituting indorsee trustee for a third party.**—For example: A note to A or order is indorsed, "Pay B or order for the benefit of C."

As in the case of an indorsement constituting the indorsee the agent of the indorser, such an indorsement as this operates to charge all subsequent parties dealing with the instrument with notice of the rights of C.[37] As holder of the paper, B may, of course, enforce payment of the paper.

But what are B's rights against A? It would seem too plain for argument that the rights of B should not be different from the rights of any indorsee against an indorser under a regular indorsement. As far as A is concerned the instrument is as completely and unqualifiedly disposed of as if the indorsement were in the ordinary form, "Pay B or order." And it has been so held.[38]

But the statute throws the law, in this regard, into confusion. It provides that the indorsee under a restrictive indorsement may "bring any action thereon that the indorser could bring."[39] Since, in the case supposed above, A, the indorser, could not sue himself, it would seem to follow that B, the restrictive indorsee, could not sue A. It has been suggested, however, that this statute is merely permissive, and not restrictive, and hence, that B would not be precluded from bringing any action that he could bring in the absence of the statute.[40]

[37] Hook v. Pratt, 78 N. Y. 371.

[38] Hook v. Pratt, 78 N. Y. 371.

[39] See § 95, where statute is quoted in full.

[40] 41 Am. Law Rep. (N. S.) 437, 499, 561, article by Charles L. Mc·han.

It is also apparent that B's rights are rendered uncertain, for the same reason, against the maker, whereas this form of indorsement should not in any way affect such rights.

99. **Qualified indorsement.**—A qualified indorsement is an indorsement in such form that it operates as a complete negotiation of the instrument, but relieves the transferor from liability as an indorser.[41] In other words, the sole purpose and effect of such an indorsement is to constitute the transferee the holder of the paper, but the further consequence which the law attaches to an indorsement in the ordinary form, viz., the imposition of an obligation on the indorser to pay the instrument if the maker or acceptor does not, is avoided by the qualified indorsement.

The usual form of qualified indorsement is as follows: "Pay B or order, without recourse," signed "A," or merely "without recourse," "A." But any words of similar import will be given the same effect. It has been held, for example, that the words, "I hereby assign all my right to the within note," are, in effect, an indorsement without recourse.[42] And in Rice v. Stearns,[43] a note payable to A or order was indorsed, "for value received, I order the contents of this note to be paid to Merrick Stearns, at his own

[41] Lomax v. Picot, 2 Randolph 247, 260 (Va.); Watson v. Chesire, 18 Ia. 202, LEADING ILLUSTRATIVE CASES. But see Gale v. Mayhew, 125 N. W. 781 (Mich.), where it was held, under the N. I. L., § 38 (which provides that "A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument"), that an indorsee under a qualified indorsement was a mere assignee and could not sue in his own name.

[42] Evans v. Freeman, 142 N. C. 61, 54 S. E. 847.

[43] 3 Mass. 225.

risk." The court held that the indorsee got title, but could not sue A on his indorsement.

It has also been held that an indorsement "without recourse" is not a suspicious circumstance charging a purchaser with notice of the possible existence of equities.[44]

100. **Conditional indorsement.**—Suppose a note regular in form, payable to A or order, is indorsed by A, "Pay B or order provided he delivers to me a horse within two months from date." This is a conditional indorsement.

Strange to say, there is a marked dearth of authority with reference to the effect of such an indorsement. It has been decided, and rightly so, that B cannot recover against A on the contract of indorsement, unless the condition is complied with.[45] And it also seems obvious that any transferee from B would take such paper subject to the rights of A. Both these results are confirmed by the Negotiable Instruments Law, which provides[46] that "any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally."

But what are the rights and duties of the maker of such a note with reference to payment? Suppose B presents the note for payment and the maker pays B. Then suppose thereafter A demands payment of the note from the maker on the ground that the condition of the indorsement had not been complied

[44] Elgin City Banking Co. v. Hall, 119 Tenn. 548, 108 S. W. 1068.
[45] Johnson v. Barrow, 12 La. Ann. 83.
[46] N. I. L., § 39.

with. In other words, need the maker pay any attention to the condition? In an early English case the obligor was required to pay a second time.[47]

The objections to the rule laid down in the English case are very apparent. The maker of a note or the acceptor of a bill, so indorsed, is placed between two fires. On the one hand, he must refuse to pay the indorsee at his peril, for if the condition had been complied with the indorsee would be able to enforce payment, together with costs. On the other hand, if he pays the indorsee, he may find later that the condition had not been complied with, and hence be compelled to pay it a second time to the prior holder.

The Negotiable Instruments Law, recognizing the force of these objections, has provided:[48] "Where an indorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not."

101. **Transfer without indorsement.**—It has been pointed out in previous sections that bills or notes payable to order must be indorsed, as well as delivered, in order to constitute a complete negotiation. We have also seen that bearer paper may be negotiated simply by delivery. It remains to discuss the effect of a sale and delivery of paper payable to order without indorsement.

The rule of the law merchant is stated by Mr. Justice Harlan, in Osgood's Admrs. v. Artt,[49] as fol-

[47] Robertson v. Kensington, 4 Taunt. 30 (Eng.).
[48] N. I. L., § 39.
[49] 17 Fed. 575, at 577.

lows: "* * * It is * * * well settled that the purchaser, if the paper be delivered to him without indorsement, takes, by the law merchant, only the rights which the payee has, and, therefore, takes subject to any defense the payer may rightfully assert as against the payee. The purchaser in such case becomes only the equitable owner of the claim or debt evidenced by the negotiable security, and, in the absence of defense by the payer, may demand and receive the amount due, and, if not paid, sue for its recovery, in the name of the payee, or in his own name, when so authorized by local law." In other words, so long as the paper remains unindorsed the transferee is substantially in the position of the assignee of a chose in action. But as against the transferor the transferee may compel an indorsement of the instrument, provided the indorsement was omitted by fraud, accident or mistake.[50]

The Negotiable Instruments Law covers this entire question in the following language:[51] "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

[50] Osgood's Ad'mrs. v. Artt, 17 Fed. 575.
[51] N. I. L., § 49.

CHAPTER VI.

HOLDER IN DUE COURSE AND DEFENSES.

102. **Holder in due course—In general.**—As indicated in the previous chapter, the holder of a bill or note is the one who owns it; more specifically, he is the one who is within the description and in possession of it. Thus, if a note is made payable to A or order and delivered to A, A is said to be the holder of the note. If A indorses and delivers it to B, B in turn becomes the holder thereof. Again, if the instrument is made payable to bearer, each person who comes into possession of it is in turn the holder.

Holder means nothing more. One may be the holder of commercial paper and yet not be able to recover on it. He may have legal title, but his title may be defective. He may have become a holder by negotiation and yet be in no better position than his transferor. As holder and nothing more every defense good against his transferor may, perchance, be asserted against him; every defect in the title of his predecessor may be transmitted to him.

For the holder in due course the law merchant reserves its choicest bestowals. To him is accorded the privilege of securing a better title, in many instances, than that possessed by his transferor. For example: A is induced by the fraud of B to execute a note in favor of B. B's title is defective. If he

were to sue on this note A could set up the defense of fraud and prevent him from recovering. But suppose B negotiates the note to C, a holder in due course. C may recover against A. Thus C secures a better title than that possessed by B. Or, again, suppose A is the holder of a note payable to bearer. A loses it. B finds it. As against B, A could recover the note. But if B sells it to C, a holder in due course, C may retain it. B's title was defective. C's title is good.[52]

103. **Holder in due course defined.**—In the Negotiable Instruments Law a holder in due course is defined as follows:[53] "A holder in due course is a holder who has taken the instrument under the following conditions:—

1. That it is complete and regular on its face;
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

More briefly, a holder in due course may be defined as one who has become the holder of a bill or note before maturity, for value and without notice of any defects or infirmities of title. In the absence of any one of the requirements above enumerated, one is not a holder in due course, and hence does not take

[52] Defenses and defects of title will be taken up in detail in § 118 and following.

[53] N. I. L., § 52.

the instrument freed from any infirmities of title that it may possess. It is thus important that each of these requirements be considered separately and with care.

104. **The instrument must be complete and regular on its face.**—This is, in effect, saying that one cannot be a holder in due course of a document which is not a negotiable instrument. Thus, if a paper, in the form of a negotiable note, except for the fact that it is not signed or to which the signature is obviously incomplete, gets into circulation, no one can be a holder in due course thereof.[54]

Nor can one who takes a note, across the face of which is written in red ink, "This note is not negotiable," be a holder in due course.[55]

105. **The negotiation must occur before the instrument is overdue—In general.**—When negotiable paper matures it is supposed to have run its course. If the obligor lives up to his promise he will pay the instrument when it is due and take it out of circulation and cancel or destroy it. Hence, if the instrument is not paid when it is due, it is sometimes said to indicate that the obligor has a legally sufficient reason for not paying it, i. e., a good defense. Therefore, anyone to whom it is transferred after it is due takes it subject to the risk of defenses or other defects of title.

This does not mean, however, that after maturity all of the incidents of negotiability are gone. Negotiable paper may still be transferred as before ma-

[54] Davis Sewing Machine Co. v. Best, 105 N. Y. 59.
[55] Prins v. South Branch Lumber Co., 20 Ill. App. 236.

turity so as to constitute the transferee the holder thereof. As holder he may sue in his own name, and, in the absence of defenses, enforce payment. But holder in due course so as to take free from defenses and defects of title, the transferee after maturity cannot be.

106. **When is a bill or note considered overdue?**—Originally a bill or note made payable at a fixed date was not actually due until three days after the date named. The law merchant allowed three days of grace after the date indicated for the payment of commercial paper. Under this rule a note payable January 5 could be transferred January 8 so as to constitute the transferee a holder in due course.

But since days of grace have been generally abolished, today, a note payable January 5 would, under the general modern law, mature on the day named and a transfer the next day would be a transfer after maturity. This statement is, however, subject to the exception that if the day for payment falls on Sunday or any legal holiday, the instrument is not due till the next succeeding business day.[56]

107. **When is installment paper overdue?**—Suppose a note is executed for the sum of $100, payable in four equal installments, the first installment to be paid February 1, the second March 1, the third April 1, and the fourth May 1. Such a note is treated as overdue in its entirety when any single installment is past due and unpaid.[57]

A transferee of an installment note, therefore,

[56] N. I. L., § 85.

[57] Vinton v. King, 4 Allen 562 (Mass.), LEADING ILLUSTRATIVE CASES.

takes it at his peril any time after the day for the payment of the first installment, and since there is no law requiring that the payment of any installment be indorsed on the note, the transferee must depend for his information upon personal inquiry.

The general rule is different, however, if the interest only is made payable in installments. As stated in Kelley v. Whitney,[58] "The interest is a mere incident of the debt, and although it is frequently provided that it shall be paid at stated periods, before the principal falls due, we know of no authorities holding that a failure to pay it dishonors the note, so as to let in all defenses against subsequent purchasers for value without any other notice of defects except the mere fact that such interest has not been paid. * * * The maturity of the note, within the meaning of the commercial rule upon this subject, is the time when the principal becomes due."

108. **When is paper payable on demand overdue?**—For purposes of suit demand paper is due at once, that is, as soon as delivered, and no actual demand is necessary before filing an action. The institution of the proceedings constitutes a sufficient demand. Likewise the Statute of Limitations begins to run at once in favor of those who are obligated on the paper.

But for purposes of negotiation demand paper is not treated as overdue until a reasonable time has

[58] 45 Wis. 110; Cromwell v. County of Sac, 96 U. S. 51, 58. But see Cooper et al. v. Merchants', etc., Bank, 57 N. E. 569 (Ind.), holding that if the transferee knows that installments of interest are unpaid it is a circumstance for the consideration of the jury on the question of the transferee's good faith.

elapsed after its issue. Hence, anyone who takes a bill or note payable on demand, before the expiration of a reasonable time after it is issued, may, so far as the time of taking is concerned, be considered a holder in due course.[59]

With reference to the negotiation of demand paper the Negotiable Instruments Law provides as follows:[60] "Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course."

The statute thus lays down the general rule of the law merchant, except that no provision is made for certificates of deposit, which, prior to the statute, were, generally, not treated as overdue until demand had actually been made.[61]

109. **Same subject—Reasonable time as applied to the transfer of demand paper.**—Daniel, in his work on Negotiable Instruments, says that what is a reasonable time "cannot be fixed by any precise rule. One day's delay of paper on demand certainly would not dishonor it; five years would; and in each case, how many days, or weeks, or months are requisite for this effect, must depend upon the test, whether so long a time has elapsed, that it must be inferred from the particular circumstances and the general conduct of business men, both of which should be considered, that the paper in question must

[59] Daniel, Negotiable Instruments (5th ed.), § 783.

[60] N. I. L., § 53.

[61] Nat'l Bank of Fort Edward v. The Washington Co. Nat'l Bank, 5 Hun 605 (N. Y.). In this case a transferee who took a certificate of deposit 7 years after it was issued was considered a holder in due course.

have been intended to be paid within this period, and, if not paid, must have been refused."[62]

And the Negotiable Instruments Law provides as follows:[63] "In determining what is a 'reasonable time' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case."

Illustrations in decided cases on this question are plentiful. A few only will be given. Twenty-three days has been held a reasonable time;[64] four months,[65] and even two and one-half months,[66] an unreasonable time. And in a more recent case[67] eighteen months was decided not to be an unreasonable time where interest was paid monthly to the payee and also to the transferee after he took the instrument.

110. **The transferee must be a holder for value.**— The rule is fundamental that a donee of a bill or note is in no better position than his transferor. If B secures a note from A by fraud and thereafter transfers it to C, by way of gift, C cannot enforce payment of the note, even though he may have received it before maturity and in total ignorance of the wrong committed by B. In order that C's rights may rise higher than B's, it is necessary that he shall have given value for the transfer.

[62] Daniel, Negotiable Instruments (5th ed.), § 783.

[63] N. I. L., § 193.

[64] Mitchel v. Catchings, 23 Fed. 710.

[65] Paine v. Central Vermont R. Co., 14 Fed. 269, LEADING ILLUSTRATIVE CASES.

[66] Losee v. Dunkin, 7 Johns. 70 (N. Y.).

[67] McLean v. Bryer, 24 R. I. 599, 54 Atl. 373.

The question here as to what constitutes value is not different from the general question of consideration heretofore discussed. To state the rule again in general terms, value is anything which would serve as consideration for the support of a simple contract.[68]

111. **The transferee must take the instrument in good faith.**—It is universally agreed that a transferee of negotiable paper, notwithstanding it is negotiated to him before maturity and for value, takes it subject to all defects and defenses of which he has actual knowledge. Knowledge of defects and bad faith are one. Also the bad faith of one who has knowledge of circumstances which in fact arouse his suspicions, but who deliberately refrains from making an investigation lest he actually discover the defect, the presence of which he suspects, is conceded.

But a question has been raised as to whether circumstances less extreme than those above indicated will deprive one of the character of a taker in good faith. Suppose, for example, A, the payee of a note for $800, sells it to B shortly before it is due for $100; and suppose, further, that A obtained the note from the maker by fraudulent inducements, so that in A's hands it would have been unenforcible. Now, assuming that the fact that the note was offered to B near maturity for one-eighth of its face value was a circumstance which would have aroused the suspicions of a reasonably prudent individual, but which did not arouse B's suspicions, the question is, will B's negligence deprive him of the rights of a holder

[68] See § 59 of this article.

in good faith? Lord Blackburn, in Jones v. Gordon,[69] speaking with reference to such a set of facts, answers the question as follows: "* * * I think it is right to say that I consider it to be fully and thoroughly established that if value be given for a bill of exchange, it is not enough to show that there was carelessness, negligence, or foolishness in not suspecting the bill was wrong, when there were circumstances which might have led a man to suspect that. All these are circumstances which tend to show that there was dishonesty in not doing it, but they do not in themselves make a defense to an action upon a bill of exchange." In other words, the doctrine of the English court is, as pointed out more fully in the course of the decision, that negligence, however gross, does not in and of itself amount to bad faith, but is at most evidence of bad faith, that is, evidence tending to show that the transferee actually knew of the infirmities in the note or that he strongly suspected their existence and purposely refrained from making inquiry.

112. **Same subject—American rule.**—The weight of judicial decision in the United States is in accord with the rule thus announced by the English court. The majority rule in this country is, therefore, that nothing short of actual bad faith amounts to lack of good faith.[70]

But there are a number of courts holding to the contrary, that a transferee takes subject to equities

[69] 2 App. Cases 616 (Eng.).

[70] Hamilton v. Vought, 34 N. J. L. 187; Goodman v. Simonds, 20 How. 343 (U. S.), LEADING ILLUSTRATIVE CASES; Cheever v. Pittsburgh, etc., R. R. Co., 150 N. Y. 59.

and defenses if he have knowledge of such facts as would have put a reasonably prudent man on his guard and excited his suspicions.[71]

Rule under the statute. The Negotiable Instruments Law provides:[72] "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

This section of the Negotiable Instruments Law has been construed to be in accord with the English rule and the majority rule in the United States prior to the statute. The negligence rule, therefore, will have been supplanted in some of the states by the statute.[73]

113. **Deriving title from a holder in due course.**— Suppose B obtains a note from A, as maker, by fraud; before maturity B negotiates this note to C, who pays value for it and has no notice of B's fraud on A. According to the rules above discussed, C is a holder in due course and may compel A to pay the note when it comes due. A's defense is not good against C. But now suppose, further, that C transfers this same note to D, D at the time knowing of B's fraud on A. Notwithstanding this knowledge, the law protects D.[74] As a transferee from a holder in due

[71] Murray et al. v. Beckwith, 48 Ill. 391; Gould v. Stevens, 43 Vt. 125.

[72] N. I. L., § 56.

[73] Brannan, Negotiable Instruments Law (2nd ed.), p. 62; Unaka Nat'l Bank v. Butler, 113 Tenn. 574, holding that the statute changed common law rule in that state; McNamara v. Jose, 28 Wash. 461.

[74] Simon v. Merritt, 33 Ia. 537.

course, D is also considered a holder in due course.

Likewise if D were a donee from C, or if the instrument were transferred to D after maturity, he would be a holder in due course. The chief reason for this result is that any other rule would handicap C in disposing of property to which he, by hypothesis, has good title. In order to complete protection to the holder in due course, therefore, it is necessary that his transferee be fully protected at all events.

Exception to foregoing. There is, however, a notable exception to the general rule as above stated. If in the case supposed D should at any time transfer the note back to B it would again be subject to the defense of A. Or if D should transfer it to E, and E to B, the same result would follow. The reason for this exception is plain. B is at the outset, in effect, a constructive trustee of this note for A, arising from the unconscionable manner in which he secured it from A, and, therefore, is under a duty to surrender it to A. Hence, by getting the note back and thus putting himself in a position to save A from loss, he is only doing what is his duty to A to do. B's position is, thus, in contemplation of law, when he again secures title to the note, not different from what it was originally.

The statute covers the rule and exception, as follows:[75] "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder

[75] N. I. L., § 58.

in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."

114. **Amount of recovery by holder in due course.** —The generally accepted rule has always been that a holder in due course is entitled to recover the full face value of a bill or note, regardless of what he has paid for it, and regardless of the existence of defenses good against prior holders.[76]

But there has been some authority to the effect that a person who buys commercial paper at a discount can recover only the amount he has paid for it, if the maker has a defense good against the transferor.[77] The minority rule has little to recommend it and would clearly be monstrous if applied to bonds, which are sold so often at quotation prices of 60, 80, or 90 cents on the dollar.

It is not surprising, therefore, that the statute adopted the majority rule above stated.[78]

Accommodation paper. There has, however, been a wide conflict of authority as to the amount that a holder in due course may recover against one who has signed a bill or note as an accommodation party. In some jurisdictions it has been held that the transferee of an accommodation bill or note can recover only the amount which he paid for the instrument, even though he take it in ignorance of its true character. This result has been reached, especially, in

[76] National Bank etc. v. Green, 33 Ia. 140; Cromwell v. County of Sac, 96 U. S. 51, 60.

[77] Holcomb v. Wyckoff, 35 N. J. L. 35.

[78] N. I. L., § 57.

cases where the accommodation paper was secured by fraud.[79]

These results are based on the theory that accommodation paper is made for the purpose of securing a loan, and hence that when the amount advanced by the holder on such paper is repaid with lawful interest he should be satisfied. Following out the loan theory still further, it is held that if the discount is so large as to exceed a lawful rate of interest, the transaction will be considered usurious and void, if the party so taking it knows that it is accommodation paper.[80]

The law on this entire question of accommodation paper is, however, in hopeless confusion under the common law decisions. While the statute makes no exception in express terms in favor of accommodation paper, it remains to be seen what results will be reached thereunder. In any case where the transferee knows that he is taking accommodation paper, the former usury doctrine may well still obtain under the statute, and it has been so held in at least one case.[81]

115. **Same subject—Transferee receiving notice before consideration paid in full.**—It is necessary to distinguish carefully between a case where a transferee purchases a bill or note outright for less than its face value and a case where a transferee agrees to pay a certain amount for the paper and learns of defects or defenses before he has paid all that he has

[79] Daniel, Negotiable Instruments (5th ed.), §§ 754-758 inclusive.
[80] Daniel, Negotiable Instruments (5th ed.), § 750 and following.
[81] Strickland v. Henry, 73 N. Y. S. 12.

tled to it. The short explanation of it all is that the pledgee is a purchaser for value only to the extent of the advance made by him on the paper.[85]

117. **Every holder presumptively a holder in due course—Burden of proof.**—The Negotiable Instruments Law provides:[86] "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

The rules here stated were the general rules of the law merchant prior to the statute.[87]

The first clause in the statute may be illustrated as follows: B obtains a note by fraud from A and negotiates it to C. When A establishes the fact of B's fraud the burden of proof is then upon C to show that he received the note for value and without notice of the fraud. The reason for placing the burden on C in such a case is said to be due to the fact that a fraudulent party may often desire to turn the paper over to a friend to sue upon, hence the holder must negative the fact that he is a mere dummy for the defrauder.

And the following hypothetical case illustrates the last clause of the statute. A executes a valid note

[85] Stoddard v. Kimball, 6 Cush. 469 (Mass.); N. I. L., § 27.

[86] N. I. L., § 59.

[87] Tatam v. Haslar, L. R., 23 Q. B. Div. 345 (Eng.); Campbell v. Fourth Nat'l Bank, 137 Ky. 555, 126 S. W. 114.

to B. C secures a transfer of the note in a fraudulent manner from B and then negotiates it to D. D sues A. The fraud of C in nowise affects A, and cannot be made a defense by A when sued by D. Hence, no showing with reference to this is required from D.[88]

Prior to the statute, if the defense were want or failure of consideration, the burden was, according to the general rule, on the defendant throughout the trial to show that the plaintiff was not a holder in due course.[89]

The effect of the statute on this rule is not clear.

118. **Defenses and other matters affecting title—In general.**—Intimately connected with the subject of holder in due course is the subject of defenses and other matters affecting the title to commercial paper. For, as heretofore pointed out, the special advantage in being a holder in due course is the privilege of taking negotiable paper freed from certain defects and infirmities previously clinging to it.

But even the holder in due course, favored, as he is, by the law merchant, does not take a bill or note free from every possible infirmity or defect affecting it while in the hands of a prior holder. Some defects there are which follow the instrument from the time they attach to it to the end, no matter when, under what circumstances, or into whose hands it

[88] Crawford, Negotiable Instruments Law (3rd ed.), p. 79 note; Prouty v. Roberts, 6 Cush. 19 (Mass.); Voss v. Chamberlain, 139 Ia. 569, 117 N. W. 269 (under the statute); but see Parsons v. Utica Cement Mfg. Co., 80 Conn. 58, 66 Atl. 1024, contra to Voss v. Chamberlain; Second trial of Parsons v. Utica Cement Mfg. Co., 82 Conn. 333, 73 Atl. 785.

[89] Holden et al. v. Phoenix Rattan Co., 168 Mass. 570.

may pass. It is necessary, therefore, to examine this subject with care, with a view especially to determine which defects will and which will not incumber the title of the holder in due course.

In this connection two sections of the Negotiable Instruments Law need to be considered:

First:[90] "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

Second:[91] "The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

119. **Defenses defined.**—With reference to the rights of a holder in due course, defenses to negotiable paper may be divided into two general classes, viz., real and personal.

Real defenses are those which may be asserted against a holder in due course. They are called real defenses because they attach to the res, i. e., the instrument itself, and may, therefore, be made available regardless of the merits or demerits of the holder. As it is sometimes said, the real defense is good against the world.

[90] N. I. L., § 57.
[91] N. I. L., § 55.

Personal defenses are those which cannot be asserted against a holder in due course. They are also often referred to as equitable defenses. Personal defenses have their inception in the agreement or conduct of a particular person in regard to the instrument which renders it inequitable for him, though holding legal title, to enforce it against the obligor. They are called personal because they are available only against that particular person or such subsequent holders as may stand exactly in his shoes.

Real defenses may be enumerated as follows: 1. Want of capacity to make a binding contract. This incapacity may arise from infancy, insanity, extreme intoxication, coverture, or corporate incapacity due to a statutory or charter prohibition against the issuance of negotiable paper. 2. Illegality, provided a statute declares the contract void. This is done in some jurisdictions in case of usurious, gambling, and Sunday notes or bills. 3. Forgery, which includes not only the unpermitted signing of another's name, but also fraudulent alterations of the body of the paper in amount, etc., unless such alteration is made easy by the negligence of the party sought to be charged, for instance, where the paper is written in lead pencil or blank spaces are left.[92] 4. Fraud in the execution.

The usual personal defenses will fall under one of the following heads: 1. Fraud in the inducement; 2. Duress; 3. Failure or absence of consideration; 4. Illegality, either by the common law or by statute,

[92] Canon v. Grigsby, 116 Ill. 151. Even fraudulent alteration is a personal defense under the statute. See § 172 of this article.

unless the statute renders the contract absolutely void; 5. Payment, renunciation or release before maturity; 6. Lack of delivery; 7. Alteration under the Negotiable Instruments Law.

120. **Fraud as a defense.**—The word fraud is used in two different senses in the Law of Negotiable Instruments. Fraud of one kind is a real defense and fraud of the other kind is a personal defense. To operate as a real defense it must be fraud in the execution, sometimes termed fraud in the inception, of the instrument. For example, by means of some deceitful practice or trick one is induced to sign a paper which turns out to be in the form of a negotiable instrument but which, at the time he executes it, he believes to be something entirely different.

When there is fraud in the execution there is, thus, really a want of contract. And since no contract comes into existence there is nothing to which one's rights as a holder in due course can attach. Hence fraud of this kind, fraud in the inception, is a defense good against the world.

But fraud that operates as a personal defense is of a different character. It is fraud in the inducement that is treated as a personal defense. The situation here is that the party upon whom the fraud is practiced knows perfectly well what he is signing, knows that it is a negotiable instrument and is intended by him to be such, but he is induced to execute it by some fraudulent misrepresentation as to some collateral matter, or, as is commonly the case, as to the nature or value of the consideration. In this case a contract comes into existence, but it is voidable

against the fraudulent party or any one who stands in his position.[93]

121. **Same subject—Fraud in the inception.**—The case of Hewitt v. Jones[94] is an excellent and rather typical illustration of fraud in the inception of a negotiable instrument. A, the vender of a patent hay fork, by a surreptitious substitution of a promissory note for a paper purporting to be an appointment of B as agent to sell the hay fork, secured B's signature to an instrument in the form of a note. B thought he was signing the contract of agency merely. A then sold the note to C. The court held that it was immaterial whether C was a bona fide purchaser for value or not for in no event could he recover. The instrument was void.

So again in Wilson v. Miller,[95] the defendant signed what was in fact a promissory note under the belief that he was signing his name and address merely in a book, in order that he might receive a sample hay fork to display. This was held to be a real defense. A clever trick of the same general character came up for consideration in Pennsylvania.[96] A presented to B a paper in the form of a printed contract but it was so printed that it could be cut in two, thus leaving the portion over B's name in the form of a note. It was held that, in the absence of negligence, B's defense was good against a holder in due course.

122. **Same subject—Signer negligent.**—As indi-

[93] Bigelow, Bills, Notes and Cheques (2nd ed.), p. 205; Papke v. The G. H. Hammond Co., 192 Ill. 631.

[94] 72 Ill. 218.

[95] 72 Ill. 616.

[96] Brown v. Reed, 79 Pa. St. 370.

cated in the case just referred to, in order that the defense of fraud in the inception or execution may be made available against a holder in due course, it is especially required that the party claiming the defense shall have been free from negligence in not discovering the trick.

Thus it has been held that if one can read and fails to read the paper before signing it, relying merely upon the statement of the person presenting it to him, as to its contents and character, he cannot shift the burden of his folly to innocent shoulders.[97]

It has also been held that, even though the party signing the instrument could not read, he could not defend against a holder in due course, where it appeared further that the person with whom he was dealing was a total stranger and defendant had friends near, whom he could easily have called upon to read the paper for him.[98]

In deciding what is negligence, each case must, however, be determined upon its own special circumstances.

123. **Effect of the statute on the defense of fraud.** —By referring back to the provisions of the Negotiable Instruments Law,[99] it will be observed that a holder in due course takes an instrument free from a defect of title arising from fraud practiced in obtaining it. But the statute does not define in what sense it is using the word fraud.

It is no doubt safe to assume, however, that these

[97] Chapman v. Rose, 56 N. Y. 137, LEADING ILLUSTRATIVE CASES.
[98] Swannell v. Watson, 71 Ill. 456.
[99] See § 118 of this article.

provisions will be construed in the light of the law as it existed prior to the statute. If so, the fraud there referred to is fraud in the inducement, which prior to the statute was a personal defense, and not fraud in the execution, which has always been a real defense.[1]

124. **Effect of the statute on the defense of illegality.**—Prior to the Negotiable Instruments Law illegality was sometimes a real defense and sometimes a personal defense. If the defendant could point to a statute in which it was expressly provided that an instrument given for the consideration upon which his obligation was based was void, his defense was good even against a holder in due course—a real defense. But in the absence of such a statutory provision illegality was only a personal defense.

Instruments given for money lost in gambling or to secure money borrowed to be used in gambling were thus not infrequently declared void by local statutes. And usury was sometimes the subject of similar drastic legislation.

What, then, is the effect of the Negotiable Instruments Law upon prior statutes making certain instruments void? The Negotiable Instruments Law provides, without qualification, that an illegal consideration shall not preclude recovery by a holder in due course.

Professor Brannan in his excellent annotation of the Negotiable Instruments Law answers the question as follows: "Illegality ceases to be a real de-

[1] Taft v. Myerscough, 92 Ill. App. 560, placing the suggested construction upon an earlier Illinois statute similarly worded.

fense under the N. I. L. (Negotiable Instruments Law) unless made so by a subsequent statute. The statutes previously in force declaring void instruments given for gaming are impliedly repealed by the N. I. L. (Negotiable Instruments Law)."[2]

Mr. Crawford, after pointing out the conflicting decisions under the statute, says, "The subject is one, perhaps, upon which the courts will never agree, for they will construe the section with reference to the policy of their respective states. In some states, the requirements of commerce will be the controlling consideration; in others, the protection of the weak and ignorant."[3]

125. **Lack of delivery as a defense.**—Is lack of delivery a real or a personal defense? For example, A executes a negotiable note in favor of B or order. B steals it or takes it by force from A and negotiates it to C, a holder in due course. Can C recover? Prior to the statute, the holdings of the courts were in conflict. The Supreme Courts of Illinois and Minnesota have allowed recovery;[4] while in Indiana and Michigan emphatic decisions against recovery have been rendered.[5] The Negotiable Instruments Law has adopted the Illinois and Minnesota rule. It provides[6] that "where the instrument is in the

[2] Brannan, Negotiable Instruments Law (2nd ed.), p. 60, citing among other cases Schlesinger v. Lehmaier, 191 N. Y. 69, 83 N. E. 657; Schlesinger v. Gilhooly, 189 N. Y. 1, 81 N. E. 619. But see contra Alexander & Co. v. Hazelrigg, 123 Ky. 677, 97 S. W. 353.

[3] Crawford, Negotiable Instruments Law (3rd ed.), p. 74.

[4] Shipley v. Carroll, 45 Ill. 285; Clarke v. Johnson, 54 Ill. 296; Kinyon v. Wohlford, 17 Minn. 239.

[5] Palmer v. Poor, 121 Ind. 135; Burson v. Huntington, 21 Mich. 415.

[6] N. I. L., § 16.

hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable is conclusively presumed."

Lack of delivery is thus, by the statute, made a personal defense. It follows that if a note is made payable to bearer and delivered to B, or is made payable to B or order and indorsed in blank by B and is thereafter stolen from B and negotiated to C, a holder in due course, C's title is perfect. It is B's loss.[7] Or if A executes a note in favor of B or order and delivers it to B with an agreement that B shall not enforce it or dispose of it except upon certain conditions and B, in violation of his agreement, negotiates it to C, a holder in due course, C may recover upon it.[8]

126. **Lack or failure of consideration as a defense.** —The Negotiable Instruments Law provides:[9] "Absence or failure of consideration is a matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise."

Thus absence or failure of consideration is not only a matter of defense, i. e., a matter for the defendant to plead, but it is a personal defense.

The statute goes beyond the settled rules of the law merchant in one respect only. Prior to the statute the courts were not uniform in treating a partial failure of consideration as a defense unless

[7] Mass. Nat'l Bank v. Snow, 187 Mass. 159, 72 N. E. 959.
[8] Hodge v. Smith, 130 Wis. 326, 110 N. W. 192.
[9] N. I. L., § 28.

the part alleged to have failed was ascertained and definite; otherwise the prior law is merely codified.[10]

Accommodation paper. There are special rules, however, governing accommodation paper. It is understood in the commercial world that an accommodation party has received no consideration for his undertaking. He merely loans his credit. Hence knowledge on the part of a transferee that the accommodation party signed without receiving any consideration in no wise affects the transferee's rights. Absence of consideration is not, therefore, a defense to accommodation paper even though the transferee takes with notice.[11]

[10] Crawford, Negotiable Instruments Law (3rd ed.), p. 44.
[11] N. I. L., § 29.

CHAPTER VII.

LIABILITIES OF PARTIES.

127. **Contract of maker and acceptor.**—The maker of a note and the acceptor of a bill are subjected to what is termed primary or absolute liability.

The Negotiable Instruments Law expresses the obligation of each as follows: "The maker of a negotiable instrument by making it engages that he will pay it according to its tenor. * * *"[12] "The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance."[13]

No diligence, therefore, need be exercised, nor preliminary steps of any kind taken, by the holder, as conditions precedent to his right to enforce payment against either the maker or acceptor. It is not necessary even to present the instrument and demand payment before starting suit, and, as stated in a previous section, this applies as well to paper payable on demand as to paper payable on a day named. The entire burden is thrown upon the maker or acceptor to seek out the holder and make payment when the obligation comes due.

If, however, the instrument is made payable at a particular place, as for example, at a certain bank, a deposit of the money, or readiness there on the due

[12] N. I. L., § 60.
[13] N. I. L., § 62.

date to meet the obligation, exonerates the acceptor or maker from all costs, and interest after maturity. But even this does not otherwise relieve him, nor affect the rights of the holder.[14]

128. **Liability on a lost or destroyed instrument.**—Accidental loss or destruction of an instrument does not preclude the owner from recovering against any of the parties liable thereon. It affects the procedure merely.

The general requirement is that the suit be brought in equity and a bond of indemnity given by the plaintiff to protect the defendant against possible loss in case the instrument should later turn up in the hands of a holder in due course.

In some jurisdictions, however, no bond is required if it appears that the instrument was destroyed, or that it was lost after maturity, or that it was payable to order and not indorsed. These results are based on the theory that in such cases the paper can by no possibility be in the hands of a holder in due course.[15]

129. **Admissions by maker and acceptor.**—Both maker and acceptor admit the existence of the payee and his then capacity to indorse.[16]

Thus it has been held that the maker of a note cannot avoid payment to an indorsee on the ground that the payee was an infant at the time of the indorsement;[17] nor on the ground that the payee-

[14] Montgomery v. Elliott, 6 Ala. 701; N. I. L., § 70.

[15] Daniel, Negotiable Instruments (5th ed.), §§ 1478-1481; O'Neil v. O'Neil, 123 Ill. 361.

[16] N. I. L., §§ 60, 61 and 62.

[17] Frazier v. Massey, 14 Ind. 382.

indorser was a foreign corporation, which had not complied with certain statutory requirements imposed as a condition precedent to the right to transact business in the state where the note was given and indorsed.[18]

130. **Same subject—Additional admissions by acceptor.**—In addition to the foregoing admissions, the acceptor admits "the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument."[19]

For example, C draws a bill of exchange on B and forges A's name to it as drawer, making the bill payable to the order of himself, C. B accepts the bill. C then negotiates the bill to D, a holder in due course. Later B learns of the forgery and refuses to pay it. D sues. D may recover. As against the holder in due course, the acceptor cannot dispute the genuineness of the drawer's signature.[20]

The same rule is applied where C forges A's name to a check as drawer and indorses it to a holder in due course. If the bank certifies the check it is liable to the holder in due course, or if it pays the check it cannot recover the money from the holder in due course.

If, however, the bill is negotiated before acceptance and the holder in due course learns of the forgery before he presents the bill for acceptance or the check for certification he cannot enforce payment, it seems. Or if there is no acceptance and he

[18] Neyens v. Worthington, 150 Mich. 580, 114 N. W. 404, 18 L. R. A. (N. S.) 142.

[19] N. I. L., § 62.

[20] Price v. Neal, 3 Burrow 1354 (Eng.), LEADING ILLUSTRATIVE CASES.

presents the bill or check for payment after learning of the forgery he cannot retain the money if sued by the drawee.[21]

Admission of authority of drawer to draw. A draws a check on the B Bank in favor of C. The B Bank certifies the check. The bank cannot later successfully urge that A had no funds on deposit at the time the check was certified. The certification of a check, being the equivalent of the acceptance of a bill of exchange, is an admission of the authority of A to draw.[22]

131. **Same subject—As to genuineness of the body of the bill and indorsements.**—The acceptor does not, however, admit the genuineness of the body of the bill. If, therefore, a bill or check has been fraudulently raised, the acceptor cannot be compelled to pay it even to a holder in due course. In the event that he does pay it, he may recover the money so paid.[23]

Nor does the acceptor admit the genuineness of the signature of an indorser. Hence if an indorsement is forged the acceptor cannot be compelled to pay, and if he does pay, he may recover the amount from the party to whom payment is made.[24]

132. **Liability of the drawer.**—The Negotiable Instruments Law states accurately and concisely the rules of the law merchant, as follows:[25] "The drawer by drawing the instrument admits the exist-

[21] The First Nat'l Bank, etc., v. Ricker, 71 Ill. 439.
[22] Heuertematte v. Morris, 101 N. Y. 63.
[23] 2 Daniel, Negotiable Instruments (5th ed.), § 1661.
[24] First Nat'l Bank, etc., v. Northwestern Nat'l Bank, 152 Ill. 296.
[25] N. I. L., § 73.

ence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder."

It will be observed that the obligation of the drawer is secondary or conditional, as distinguished from the primary or absolute liability of the acceptor. His undertaking is to take care of the bill if the drawee refuses to do so, provided, however, the holder exercises due diligence in the matter of presenting it to the drawee and giving notice to the drawer in case the drawee declines to honor it. But these preliminary steps having once been taken, the drawer's obligation becomes as absolute and positive as that of a maker of a note or acceptor of a bill.

The steps that must thus be taken as conditions precedent to the right to fall back on the drawer will be discussed fully in later sections of this article.

133. **Liability of the indorser.**—The liability of the indorser of a note or bill is, like the liability of the drawer of a bill, secondary or conditional. If he indorses without qualification, he in effect promises that he will pay the bill or note provided the drawee or maker, as the case may be, dishonors it, upon the condition, however, that due diligence is exercised

by the holder in the matter of presenting it and giving notice.[26]

For example, A executes and delivers to B a negotiable note, due June 1. B indorses this note and transfers it to C. C presents the note to A on June 1 and demands payment. Now in order for C to preserve his rights against B it is necessary that he give notice at once to B of the fact that A refused to pay the note. If he does give this notice he may then sue either A or B, or both, for the amount of the note; but of course may only collect the amount of the obligation once. If he fails either to present the note on the day it is due or to give notice within the proper time and in the proper manner, he will lose his rights against B upon the contract of indorsement. But he will still retain his rights against A, the maker.

Thus while presentment for payment is not necessary to charge a party primarily liable, it is essential to hold a party secondarily liable.

Notwithstanding indorsement is not essential to the negotiation of bearer paper, nevertheless any transferor who in fact indorses such paper, is subject to all of the liabilities of an indorser.[27]

134. **Same subject—Successive indorsements.**—If an instrument has been transferred a number of times and each person negotiating it has written his name on it as an indorser, the final holder may, in case proper notice is given, hold any or all of the

[26] N. I. L., § 82; Mt. Mansfield Hotel Company v. Bailey, 64 Vt. 151, LEADING ILLUSTRATIVE CASES.

[27] N. I. L., § 67.

indorsers. He is not confined to his remedy against the one last named.

For example, if a bill is made payable to A or order, and A indorses and transfers it to B, and B indorses it to C and C in turn to D, D may go against either A, B, C, or the drawer in case the bill is dishonored by the drawee or acceptor, provided those sought to be charged have been duly notified. Again, if he chooses to exact payment from C then C may in turn recover from B, and B from A, and A from the drawer.

The statutory provision is as follows:[28] "As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally."

135. **Liability of anomalous or irregular indorser.** —An illustration will serve best as a definition of anomalous indorsement. A, as maker, signs a note, complete in every detail, in favor of B or order. C writes his name on the back of it. It is then delivered to B.

In cases of this character, C has been variously termed an anomalous indorser, an irregular indorser or an *aval* (a French word, signifying backer or guarantor). But the more important question is, what is his obligation or contract? While generally allowing parol evidence to explain the particular transaction, the courts have indulged, in the first

[28] N. I. L., § 68; Moore v. Cushing, 162 Mass. 594.

instance, every conceivable presumption. Some have said that he is presumptively a second indorser, especially where the instrument has been still further negotiated by B; others that he is co-maker; others that he is a guarantor.[29]

The Negotiable Instruments Law has solved the problem as follows:[30] "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

The liability of C in the case supposed is thus, under the statute, a secondary and not a primary liability.

This and other situations in which the anomalous indorser figures are further provided for in the statute, as follows:[31] "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as an indorser, in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee."

[29] Huffcut, Negotiable Instruments (1st ed.), p. 479 note.
[30] N. I. L., § 63.
[31] N. I. L., § 64.

A common illustration of sub-section 3 is this: A is the payee of a check, drawn on the X Bank. He wants to cash it at the Y Bank. Unless the Y Bank knows A's identity and responsibility, it will refuse to take the check. A may in such case call upon B, who is well and favorably known at the Y Bank, to assist him. B may render this assistance by indorsing the check with A. B will, of course, not be liable to A, but does put himself in a position where the Y Bank may fall back on him in case the check is later dishonored.

136. **Warranties of seller—In general.**—The term seller includes every one who negotiates an instrument, whether by an unqualified indorsement, or by a qualified indorsement, i. e., without recourse, or by delivery merely, without any indorsement, as is frequently done in the case of bearer paper. The contract of a full indorsement, therefore, does not include all of the liabilities of an indorser, nor does the saving clause "without recourse," nor negotiation without any indorsement relieve the transferor from all responsibility.

The Negotiable Instruments Law contains the following provisions covering the subject of warranty:[32] "Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which

[32] N. I. L., § 65.

would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provision of subdivision three of this section does not apply to persons negotiating public or corporation securities, other than bills and notes;"

And[33] "Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivisions one, two, and three of the next preceding section; and

2. That the instrument is at the time of his indorsement valid and subsisting."

137. **Same subject—Distinctions to be noted.**—The reader should note especially in considering these statutory provisions, which represent, in the main, well settled rules of law prior to the statute: First, that in case of negotiation by delivery the warranty extends only to the immediate transferee, while if the transferor indorses the paper his liability follows the instrument into the hands of any subsequent holder in due course; and second, that the warranty of the indorser, without qualification, is broader in respect to the validity of the instrument than the warranty of one who negotiates either by delivery or by qualified indorsement.[34] The sub-

[33] N. I. L., § 66.

[34] Compare § 65, subsection 4, and § 66, subsection 2. Observe that *knowledge* of the invalidity is required in one case and not in the other.

ject will now be further elaborated by illustrations taken from decided cases.

It should also be noted especially at this point, that every one who indorses negotiable paper, without qualification, assumes a two-fold liability. As an indorser he is an assurer of payment, which liability is imposed without reference to why payment is not made by the party primarily liable, provided only that proper demand is made and notice given; while as seller, which he also is, he is subject to certain implied warranties. His liability as a warrantor, however, is not contingent upon such acts as demand and notice by the holder, but only upon the existence of facts which give rise to the breach.[35]

138. **Warranty that instrument is genuine and what it purports to be.**—This rule has been frequently applied to forged instruments. For example, B negotiates to C a note to which the name of A has been forged as maker. If B indorses the note he may be held either upon his contract of indorsement or upon his implied warranty that the instrument is genuine and what it purports to be. If it is bearer paper and transferred to C by delivery merely or indorsed without recourse, he is still liable upon his warranty and must return the consideration received from C.[36]

Assuming further that C negotiates this instrument to D and is ignorant of the forgery, still C is liable to D on his warranty. In such cases the knowledge of the transferor is immaterial.

[35] Daniel, Negotiable Instruments (5th ed.), § 669.
[36] Merriam v. Wolcott, 3 Allen 258 (Mass.).

The warranty that the instrument is genuine and what it purports to be has also been applied where the instrument is void in its inception, though actually executed by the person named. Thus in Hannum v. Richardson[37] an indorser sold a promissory note without recourse, which had been given for intoxicating liquors sold in Vermont in violation of law and which was on that account void. The court said, "The principle is well settled, that where personal property of any kind is sold, there is on the part of the seller an implied warranty * * * that it is what it purports to be, and is that for which it was sold, as understood by the parties at the time, and in such case knowledge on the part of the seller is not necessary to his liability," and in holding the defendant liable the court said further that, "the note in question was not a note; it was not what it purported to be, or what it was sold and purchased for; it is of no more effect than if it had been a blank piece of paper for which the plaintiff had paid his fifty dollars."

It has, however, been held in New York[38] that the seller is not liable on his warranty when the instrument is void for usury unless he knows of its invalidity.

It should be added that where the seller can be charged with knowledge of the invalidity of the instrument, for any reason, the rule as stated in subsection 4 of § 65 will render him liable. And it

[37] 48 Vt. 508, 510, 511. See also Meyer v. Richards, 163 U. S. 385.

[38] Littauer v. Goldman, 72 N. Y. 506. See, however, a criticism of this case in Meyer v. Richards, above.

would also seem that one who transfers by unqualified indorsement is liable as a warrantor regardless of knowledge and no matter what the cause of the invalidity.[39]

139. **Warranty of title.**—If paper is not payable to bearer the holder thereof must make title through one or more indorsements. To illustrate: A genuine note is made payable to B or order. No one, other than B, can get title to this paper without B's indorsement. Since a forged indorsement is no indorsement, it follows that through such indorsement no one can get a good title. Hence if C steals the note in question and forges B's name as indorser and transfers it to D and D to E, E gets no title. And since D had no title, E may recover from D for a breach of his implied warranty of title.[40]

140. **Warranty of capacity of prior parties to contract.**—York County had no authority to issue certain bonds. A transferor of certain of these bonds was compelled to return the consideration paid by the transferee, the bonds not being enforcible against the county.[41]

In Erwin v. Downs,[42] a firm of married women executed a note. The note was transferred to plaintiff by indorsement. The note was void as against the makers because of their incapacity to contract. But in an action by the plaintiff against the indorser recovery was allowed on the ground that the in-

[39] N. I. L., § 66, subsection 2, quoted in § 136 of this article.

[40] Dumont v. Williamson, 18 Ohio St. 515, LEADING ILLUSTRATIVE CASES; Meriden Nat'l Bank v. Gallaudet, 120 N. Y. 298.

[41] Rogers v. Walsh, 12 Neb. 28.

[42] 15 N. Y. 575, LEADING ILLUSTRATIVE CASES.

dorser "impliedly contracted that the makers were competent to contract."

Likewise a seller is liable on his implied warranty if a prior indorsement is that of an infant, since the indorsement of an infant passes a title defeasible against any one.[43]

141. **Warranty of ignorance of facts which impair the validity of the instrument or render it valueless.**—A negotiates a note to B, knowing at the time that the maker is insolvent and hence unable to meet his obligations. The note is therefore valueless. A is liable for a breach of his warranty that he knows nothing rendering the instrument valueless.[44]

Likewise a vendor impliedly warrants that an overdue note has not been paid.[45]

It would seem also that this warranty would render a seller liable in all cases where he transfers overdue paper with knowledge of any defense, for defenses of every kind which exist at the maturity of an instrument are available against all subsequent transferees and therefore render the paper valueless.

[43] Lobdell v. Baker, 3 Metc. 469 (Mass.).
[44] Brown v. Montgomery, 20 N. Y. 287.
[45] Daskam v. Ullman, 74 Wis. 474; Ticonic Bank v. Smiley, 27 Me. 225.

CHAPTER VIII.

PRESENTMENT, NOTICE OF DISHONOR, AND PROTEST.

142. **Presentment for payment—In general.**—It has already been seen that, as regards the obligations of parties primarily liable, presentment for payment is of minor importance, and with very few exceptions is never a condition precedent to the right to file an action.[46] Especially is it to be noted that failure so to present the paper for payment never discharges the maker or acceptor.

But in connection with the obligations of parties secondarily liable, the matter of presentment for payment is of supreme consequence. Unless excused, expressly or by special circumstances, which will be hereafter discussed, all bills and notes must, as a condition precedent to the right to fall back on drawer and indorsers, be presented for payment. As to the manner of presentment, too, the law is especially strict. It must be made at the proper time, at the proper place, to the proper person, and by the proper person. Failure in any of these respects discharges all parties secondarily liable.[47]

143. **Time for presentment when due date specified.**—In any case where the day of payment is specifically indicated, that is to say, in every case

[46] Bank notes and certificates of deposit furnish the only exceptions.
[47] N. I. L., § 70.

where the instrument is not payable on demand, presentment for payment must be made on the day the paper falls due—neither before nor after that day.[48]

This time is reckoned as follows: "Where the instrument is payable at a fixed period after date, after sight or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment."[49]

Thus an instrument dated March 1 and payable ten days after date would be due March 11. But paper payable in one month or several months from date is figured according to calendar months. Thus a bill or note dated January 30 and payable one month from date is due February 28, except in leap-year, when it is due February 29; or if dated February 28 and due one month from date it is due March 28.

If the day of maturity in any case falls on Sunday or a legal holiday, the instrument is payable on the next succeeding business day.

And the statute provides further[50] that, "instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday."

Installment paper. If paper is payable in install-

[48] N. I. L., § 71.
[49] N. I. L., § 86.
[50] N. I. L., § 85.

ments demand must be made for each installment, it seems, as it comes due, in order to charge parties secondarily liable as to such installment. Each installment is regarded as a separate instrument.[51]

144. **Time for presentment of paper payable on demand.**—The Negotiable Instruments Law provides that where an instrument is payable on demand "presentment must be made within a reasonable time after its issue, except that in case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof."[52]

The rule has been heretofore stated, that demand paper is not, for purposes of negotiation, due before the expiration of a reasonable time after its issue. The reader is, therefore, referred to the previous section for a discussion of the question of reasonable time and authorities.[53]

Since an instrument issued, accepted, or indorsed when overdue, is, as regards the person so issuing, accepting, or indorsing it, payable on demand, the rules here stated are applicable to such instruments. Hence if a note, payable March 1, is negotiated by indorsement on March 2, the transferee has a reasonable time within which to present the same to the maker for payment, in order to preserve his rights against such indorser. But this does not revive the liability of prior parties.

It would also seem that if an instrument originally

[51] Eastman v. Turman, 24 Cal. 379.

[52] N. I. L., § 71; Montelius v. Charles, 76 Ill. 303, LEADING ILLUSTRATIVE CASES.

[53] See § 109 of this article.

payable on demand were indorsed an unreasonable time after its issue, the party so indorsing would be liable if the paper were presented for payment within a reasonable time after such indorsement. The Negotiable Instruments Law in providing that a bill of exchange may be kept alive, as against all parties, for more than a reasonable time beyond its issue, by keeping it circulating from hand to hand, seems to change the rule as it existed, generally prior to the statute.[54]

145. **Time for presentment of check.**—Different rules prevail in respect to checks, both as to the time of presentment and the effect of delay in presentment. The rules are stated in the Negotiable Instruments Law as follows:[55] "A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

The following distinctions will be noted between an ordinary bill of exchange and a check. Failure to present a bill at the proper time discharges the drawer and indorsers without reference to the question of actual damage. Likewise failure to present a check within a reasonable time discharges all indorsers on a check without reference to the damage actually sustained by them. But the drawer of a check is discharged by such failure or delay only in case he can show damage. For example, if the drawer has sufficient funds in the bank to meet the

[54] Parker v. Reddick, 65 Miss. 242.
[55] N. I. L., § 186.

check and the bank fails in the interim of the delay, he is discharged.[56]

Also special rules prevail as to what constitutes a reasonable time. If the person who receives the check resides in the same place where the bank, upon which it is drawn, is located, it is held that a reasonable time reaches at the latest only to the close of banking hours on the succeeding business day.[57] In the case where the bank is located in a different place the check must be sent by mail not later than the day following its receipt. Nor can this time be prolonged by the successive transfers of a check.[58]

146. **Time of day for presentment.**—No presentment, though actually made, is good unless made at a reasonable hour on a business day.[59] No mathematical test is laid down as to what is a reasonable hour. In Farnsworth v. Allen,[60] the note was presented at the maker's residence at 9 o'clock in the evening. The maker and his family had retired, but he answered the bell and upon presentment refused payment. The court held that considering all the circumstances of the case the hour was not unreasonable and the presentment, therefore, good. The general test was stated by the court as follows: "Generally it (presentment) should be made at such hour that, having regard to the habits and usages of the community where the maker resides, he may

[56] Grange v. Reigh, 93 Wis. 552.
[57] Grange v. Reigh, 93 Wis. 552.
[58] Gregg v. Beane, 69 Vt. 22.
[59] N. I. L., § 72.
[60] 4 Gray 453 (Mass.).

be reasonably expected to be in condition to attend to ordinary business."

When payable at a bank. The statute briefly codifies the law as follows:[61] "Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case, presentment at any hour before the bank is closed on that day is sufficient."

147. **Proper place for presentment.**—The rules cannot be stated better than in the words of the statute:[62] "Presentment for payment is made at the proper place,—

1. When a place of payment is specified in the instrument and it is there presented;

2. When no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;

3. When no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;

4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence."

If, therefore, a particular place is designated where payment is to be made, or if the address of

[61] N. I. L., § 75; Salt Springs Nat'l Bank v. Burton, 58 N. Y. 430, LEADING ILLUSTRATIVE CASES.

[62] N. I. L., § 73.

the person to make payment is given in the instrument, presentment must be made there and not elsewhere. The place indicated is the place where the party is presumably prepared to meet the obligation. Hence, in order to give him a fair opportunity to pay, the paper must be there presented, and cannot be treated as dishonored until such effort to collect has been made.

If the instrument is presented at the proper place and no provision is there made for payment no further effort need be made by the holder to collect the same. He may give notice of dishonor at once.[63]

148. **Proper person to whom to make presentment.**—Presentment for payment must be made to the drawee or acceptor of a bill or the maker of a promissory note—i. e., to the person primarily liable thereon.

But if the person primarily liable is absent or inaccessible, presentment is sufficient if made to any person found at the place where presentment is made, "for it is the duty of an acceptor or promisor, if he is not present himself, to have provision for the payment of his bills or notes."[64]

The three following sections of the statute cover other contingencies in the matter of presentment:

1. "Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his

[63] Crawford, Negotiable Instruments Law (3rd ed.), p. 101; Bigelow, Bills, Notes and Cheques (2nd ed.), pp. 108-112.

[64] N. I. L., § 72; Daniel, Negotiable Instruments (5th ed.), §§ 588, 590.

personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found."[65]

2. "Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm."[66]

But if one of the partners dies before the maturity of the bill or note presentment should be made to one of the survivors and not to the personal representative of the deceased.[67]

3. "Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to all."[68]

Under this provision some difficulty arises where the joint debtors live in different places remote from one another. How can presentment be made to all on the due date? The solution is that if presentment cannot, with due diligence, be made as required, additional time is allowed. The proper procedure in such a case is to present it first to one and then forward it at once to another.[69]

149. **By whom and how presentment to be made.** —Presentment must be made by the holder or an authorized representative.[70] Stated otherwise, the

[65] N. I. L., § 76; Reed v. Spear, 107 App. Div. 144, 94 N. Y. S. 1007.
[66] N. I. L., § 77.
[67] Cayuga County Bank v. Hunt, 2 Hill 635 (N. Y.).
[68] N. I. L., § 78.
[69] N. I. L., § 81.
[70] N. I. L., § 72; Sussex Bank v. Baldwin, 17 N. J. L. 487.

person presenting the instrument for payment must be in a position to give the obligor a valid discharge from the obligation in case payment is made.

Any duly authorized agent may make the presentment and the authorization need not be in writing.[71]

Upon the holder's death presentment should be made by his personal representative, even though the instrument has been specifically bequeathed.[72]

If the paper is payable to bearer, possession is a sufficient badge of authority, but if it is payable to order possession is not sufficient. In the latter case some further evidence must be furnished, else the obligor is justified in refusing payment.[73]

How made. "The instrument must be exhibited to the person from whom payment is demanded, and when it is paid delivered up to the party paying it."[74]

It has, however, been held that if the person making the demand has the paper in his possession the demand is sufficient without an actual exhibition of the instrument, if payment is not refused on that but on some other ground.[75]

Also if the instrument is lost, exhibition is excused, but not demand, it seems.[76]

It has also been held that presentment at the place of business of the payer (where that is the proper

[71] Hartford Bank v. Barry, 17 Mass. 93.

[72] Crist v. Crist, 1 Ind. 570.

[73] Story, Promissory Notes (7th ed.), § 247; Daniel, Negotiable Instruments (5th ed.), § 574; Doubleday v. Kress, 50 N. Y. 410; see contra, Jackson v. Love, 82 N. C. 405.

[74] N. I. L., § 74.

[75] Legg v. Vinal, 165 Mass. 555.

[76] Arnold v. Dresser, 8 Allen 435 (Mass.).

place) is sufficient, though there be no one there to answer, in which case, of course, there would be no actual exhibition of the paper to any one.[77]

150. **Delay in making presentment—When excused.**—The statute provides:[78] "Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence."

For example, A is the holder of a note in New York City. It must be presented in Philadelphia. A mails it in sufficient time for it to reach his agent and be presented on the day it is due. The postal clerks in New York make a mistake and send it to Washington. By reason of this delay it reaches Philadelphia after the due date but is presented forthwith upon its arrival. The court in Windham Bank v. Norton[79] held the delay excused.

151. **Presentment dispensed with, when.**—"Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made;

2. Where the drawee is a fictitious person;

3. By waiver of presentment, express or implied."[80]

Also: "Presentment for payment is not required

[77] Wallace v. Crilley, 46 Wis. 577.
[78] N. I. L., § 81.
[79] 22 Conn. 213.
[80] N. I. L., § 82.

in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument."[81]

And: "Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented."[82]

Under the rules as above stated, presentment of a check was excused in a case where the drawer was acting fraudulently, having no funds in the bank and no reasonable expectation that it would be paid.[83]

But presentment is not dispensed with in every case where the drawer has no funds in the hands of the drawee. Presentment is required if the drawer has a reasonable expectation that the bill will be paid, which may arise out of some agreement or course of dealing between drawer and drawee.[84]

Waiver may be either verbal or in writing. It is not uncommon to see it written on the instrument itself. It may also be implied from usage or from any circumstances which satisfy the mind that a waiver was actually intended.[85]

152. **Presentment for acceptance—In general.**—There are two reasons for presenting a bill of exchange for acceptance. In the first place, as heretofore stated, the drawee is not liable on the bill until he has accepted. As a practical matter, therefore,

[81] N. I. L., § 79.
[82] N. I. L., § 80.
[83] Beauregard v. Knowlton, 156 Mass. 395.
[84] Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696, 708.
[85] Cady v. Bradshaw, 116 N. Y. 188, 191.

it is advisable, as soon as possible, to secure or attempt to secure the drawee's acceptance.[86]

In the second place, in a few instances a due presentment for acceptance, i. e., a timely and proper attempt to secure the acceptance of the drawee, is a condition precedent to the assertion by the holder of his rights against the parties secondarily liable.

The well settled rules of the law merchant are stated so clearly and concisely in the Negotiable Instruments Law that this topic will be presented solely in the words of the statute.

153. **Bills that must be presented for acceptance.**—"Presentment for acceptance must be made:

"1. Where the bill is payable after sight, or in any other case, when presentment for acceptance is necessary in order to fix the maturity of the instrument; or

"2. Where the bill expressly stipulates that it shall be presented for acceptance; or

"3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. In no other case is presentment for acceptance necessary in order to render any party to the bill liable."[87]

It will be noted especially that foreign bills of all kinds must be presented for acceptance.

154. **Time for presentment.**—"Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for

[86] Daniel, Negotiable Instruments (5th ed.), § 454.
[87] N. I. L., § 143.

acceptance or negotiate it within a reasonable time. If he fail to do so the drawers and all indorsers are discharged."[88]

155. **By whom, to whom, and when presentment must be made.**—"Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and

"1. When a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

"2. When the drawee is dead, presentment may be made to his personal representative;

"3. When the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee."[89]

"A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock, noon, on that day."[90]

156. **Presentment excused entirely, when.**—"Presentment for acceptance is excused, and a bill may

[88] N. I. L., § 144.
[89] N. I. L., § 145.
[90] N. I. L., § 146.

be treated as dishonored by non-acceptance, in either of the following cases:

"1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.

"2. Where, after the exercise of reasonable diligence, presentment cannot be made.

"3. Where, although presentment has been irregular, acceptance has been refused on some other ground."[91]

157. **When dishonored.**—"A bill is dishonored by non-acceptance:

"1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

"2. When presentment for acceptance is excused, and the bill is not accepted."[92]

"Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers."[93]

The provisions of this section of the Negotiable Instruments Law apply as well to bills which need not be presented for acceptance but which are in fact presented, as to those which must be so presented.

"When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawer and

[91] N. I. L., § 148.
[92] N. I. L., § 149.
[93] N. I. L., § 150.

indorsers accrues to the holder and no presentment for payment is necessary."[94]

158. **Notice of dishonor.**—As has been seen, the first step necessary in the preservation by the holder, of a bill or note, of his rights against parties secondarily liable, is the due and proper presentment thereof for payment or acceptance or both, as the case may be. If the instrument be dishonored by non-acceptance or non-payment, the second step, in point of time but not importance, is the giving of due and proper notice of such dishonor to the drawer or indorsers sought to be charged.

The statute says, "except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser and any drawer or indorser to whom such notice is not given is discharged."[95]

159. **Form of notice of dishonor and how given.**—The law is not especially exacting in the matter of the form of the notice. It is required simply, first, that it fairly identify the instrument to the mind of the party notified, and second, that it indicate by reasonable intendment that the instrument in question has been dishonored.[96]

And a misdescription of the paper will not vitiate the notice unless the party to whom it is given is in fact misled thereby.[97] For example, a note for $200 described as a note for $175 was held by the Michigan

[94] N. I. L., § 151
[95] N. I. L., § 89.
[96] N. I. L., § 98.
[97] N. I. L., § 97.

court not to be misleading.[98] Similarly, a misdescription as to the date of the note has been held immaterial.[99]

The notice may be either oral or written, and if an insufficient written notice be given, it may be supplemented and validated by a verbal communication, and if written it need not be signed.[1]

How given. The notice "may in all cases be given by delivering it personally or through the mails." This is the rule as laid down in the Negotiable Instruments Law.[2] Prior to the statute, however, personal delivery only was considered proper, if the parties both lived in the same place, so that, in such case, if the notice were deposited in the mail and never reached the party to whom it was addressed or was delayed in reaching him he was discharged.[3] On the other hand, the mail has always been recognized as a proper means of delivery when the parties live in different places. Hence, in this latter case, the notice has been held to have been given whether or not it reached its destination, where it was properly deposited in the postoffice.[4]

The effect of using the mails to give notice is provided for in the statute as follows:[5] "Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice notwithstanding any miscarriage in the

[98] Snow v. Perkins, 2 Mich. 238.
[99] Mills v. Bank, 11 Wheat. 431 (U. S.).
[1] N. I. L., §§ 97 and 98.
[2] N. I. L., § 96.
[3] Cabot Bank v. Warner, 10 Allen 522 (Mass.).
[4] Shelburne Falls Nat'l Bank v. Townsley, 102 Mass. 177.
[5] N. I. L., § 105.

mails." And,[6] "notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department."

160. **Time within which notice must be given—Where the parties reside in the same place.**—"Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

"1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.

"2. If given at his residence, it must be given before the usual hours of rest on the day following.

"3. If sent by mail, it must be deposited in the post-office in time to reach him in the usual course on the day following."[7]

Where the parties reside in different places. "Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

"1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.[8]

"2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been

[6] N. I. L., § 106.

[7] N. I. L., § 103.

[8] Lawson & Covode v. Farmers' Bank, etc., 1 Ohio St. 206, LEADING ILLUSTRATIVE CASES.

deposited in the post-office within the time specified in the last sub-division."[9]

In applying the rules here stated, the court, in the case of First National Bank of Shawano v. Miller,[10] held that a mail which departed between the hours of 9 and 10 a. m. left at a "reasonable hour" and that a notice deposited too late for that mail was ineffective.

161. **Successive notices.**—The statute states the rules, thus:

1. "Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after dishonor."[11]

2. "Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder."[12]

Thus under rule 1 as above stated if A indorses to B and B to C and C to D, the time for bringing notice to A may be very much extended if the notice travels back through the chain of successive indorsers, for each in turn has a day after receiving notice within which to notify his predecessor in title.

[9] N. I. L., § 104.
[10] 139 Wis. 126, 120 N. W. 820.
[11] N. I. L., § 107.
[12] N. I. L., § 94.

But this rule does not operate to extend the time within which a direct notice is permitted to be given. For example, if in the case supposed D should see fit to send a direct notice to A his time for so doing would expire with the next day after dishonor.

162. **When delay excused.**—The statute provides:[13] "Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence."

Thus if a person be ignorant of the address of the party to be notified, delay is excusable provided a reasonable effort is made to ascertain the place where the notice should be sent. But after the address is learned, the notice must be sent not later than the day following.[14]

Likewise if communication be cut off by war or pestilence, delay is excused till intercourse is restored.[15]

But mere inconvenience, such as illness in the family, will not excuse delay.[16]

163. **When notice dispensed with entirely.**—The law is laid down in general terms in the Negotiable Instruments Law, as follows:

1. "Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot

[13] N. I. L., § 112.
[14] Gladwell v. Turner, L. R. 5 Exch. 59 (Eng.).
[15] James & Co. v. Wade, 21 La. Ann. 548.
[16] Turner v. Leach, 2 Ames, Cases on Bills and Notes, 381.

be given to or does not reach the parties sought to be charged."[17]

2. "Notice of dishonor is not required to be given to the drawer in either of the following cases:

(1) Where the drawer and drawee are the same person.

(2) When the drawee is a fictitious person or a person not having capacity to contract.

(3) When the drawer is the person to whom the instrument is presented for payment.

(4) Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument."[18]

3. "Notice of dishonor is not required to be given to an indorser in either of the following cases:

(1) Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument.

(2) Where the indorser is the person to whom the instrument is presented for payment.

(3) Where the instrument was made or accepted for his accommodation."[19]

4. "Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted."[20]

5. "An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a

[17] N. I. L., § 112.
[18] N. I. L., § 114.
[19] N. I. L., § 115.
[20] N. I. L., § 116.

holder in due course subsequent to the omission."[21]

Waiver of notice. 1. "Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied."[22]

2. "Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only."[23]

3. "A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice."[24]

164. **By whom notice given.**—The general rule is that, "notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given."[25]

But, as indicated, the notice need not be given in person by the party thus entitled to give the notice. The notice may be given by an agent, and where given by an agent it may be given by him "either in his own name or in the name of any party entitled to give notice, whether that party is his principal or not."[26]

[21] N. I. L., § 117.
[22] N. I. L., § 109.
[23] N. I. L., § 110.
[24] N. I. L., § 111.
[25] N. I. L., § 90.
[26] N. I. L., § 91.

Further than this, however, the law does not go. Mere knowledge of dishonor is not the equivalent of notice. Hence if a stranger to the instrument notifies any party secondarily liable it is of no effect.

A few examples will serve to make these generalizations clearer.[27] A indorses a note to B and B to C. The note is dishonored in the hands of C. C gives notice to B one day late. B in turn notifies A on the same day that he receives notice from C. The lost time is thus made up, as it were. But A is not bound. The notice is ineffectual, for, since B was discharged, the notice was not given by one bound on the note.

Again a bill indorsed by C is held by D. D's attorney gives notice to the drawer, but by mistake gives it in C's name instead of D's. The notice is sufficient, provided C is liable to D and has a right of recourse against the drawer.

165. **Notice by one may benefit others.**—The Negotiable Instruments Law provides: "Where notice is given by or on behalf of the holder it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given."[28]

Thus in Stafford v. Yates,[29] a note was indorsed by A to B and by B to C. C presented it and, payment being refused, gave notice to both A and B. B then took up the note and sued A. A defended on the ground that B had not notified him. Judgment was given for B, the court saying that the notice

[27] Benjamin, Chalmers' Bills, Notes and Checks (2nd Am. ed.), p. 186.
[28] N. I. L., § 92.
[29] 18 Johns. 327 (N. Y.).

given by C enured for the benefit of B. Likewise if C after thus giving notice had indorsed to D, D could have recovered either against A or B on the strength of C's notice.

It is provided, further, in the Negotiable Instruments Law as follows:[80] "Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given."

This provision may be illustrated simply as follows: D is the holder of a note indorsed successively by A, B and C. The note being dishonored in D's hands, D gives due notice to C, C to B and B, in turn, to A. The notice given by B to A enures for the benefit of C and D. D then may, if he chooses, bring his action against A, without having given any notice directly to A.[81]

The caution should be added that in a case like this it must appear that each indorser in the chain has given notice to his predecessor in due time, i. e., not later than the day following receipt of notice by him, and in the proper manner. Thus, if in the case supposed B were to delay too long, the chain would be broken at that point.

166. **To whom notice may be given.**—"Notice of dishonor may be given either to the party himself or to his agent in that behalf."[82]

It is not always easy to determine who is an agent within the meaning of this rule. It has been said

[80] N. I. L., § 93.
[81] Lysaght v. Bryant, 9 C. B. (C. P.) 46 (Eng.).
[82] N. I. L., § 97.

that the authority to indorse negotiable paper carries with it the authority to receive notice of dishonor.[33]

Notice where party is dead. "Where any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased."[34]

Notice to partners. "Where the parties to be notified are partners, notice to any one is notice to the firm, even though there has been a dissolution."[35]

Notice to parties jointly liable. "Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others."[36]

Notice to bankrupt. "Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee."[37]

167. **Where notice must be sent.**—The Negotiable Instruments Law provides:[38] "Where a party has added an address to his signature, notice of dishonor must be sent to that address, but if he has not given such address, then the notice must be sent as follows:

[33] Firth v. Thrush, 8 B. & C. 387 (Eng.); see also Persons v. Kruger, 45 App. Div. 184, 60 N. Y. S. 1078.
[34] N. I. L., § 98.
[35] N. I. L., § 99.
[36] N. I. L., § 100.
[37] N. I. L., § 101.
[38] N. I. L., § 108.

"1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or

"2. If he live in one place, and have his place of business in another, notice may be sent to either place; or

"3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

"But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section."

168. **Protest—In general.**—We have seen that, in general, two steps and only two are necessary to charge the drawer and indorsers of negotiable paper: first, there must be a due and proper presentment of the instrument for acceptance or payment, or both, as the case may be, and this presentment may be made either by the holder or anyone expressly delegated by him; and, second, there must be proper notice of dishonor if acceptance or payment cannot be obtained.

It must now be emphasized that this states the law only as to inland bills of exchange and all promissory notes. An additional step is required to charge the drawer and indorsers of a dishonored foreign bill of exchange. That step is called protest.[39]

It is also allowable to protest inland bills and promissory notes. Such protest, however, is not required.

[39] N. I. L., § 141. See § 3 of this article for definition of a foreign bill of exchange; Carter v. The Union Bank, 7 Humph. 548 (Tenn.).

169. **Protest defined.**—The word protest, while technically limited, has come to stand as a designation of a series of acts ultimating in a formal record of the fact that the instrument in question has been dishonored. The formality of protesting a bill or note includes the proper presentment of the instrument and the proper entry of the fact of such presentment and of its dishonor.

The particular formality as to presentment is that it must be made by a notary public.[40] In other respects the general rules, heretofore laid down, covering presentment, apply.

The making of the record often includes two steps: first, noting the dishonor; and, second, extending the protest. The "noting" consists in making a brief memorandum on the instrument of the facts that are to be more formally recorded in the certificate of protest, as, for example, the date and place of presentment, etc. The extension or the certificate of protest is covered by the statute as follows:[41] "The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:—

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if

[40] The law merchant also permitted protest to be made by a reputable citizen of the place where the bill was dishonored in the presence of witnesses, if a notary could not be secured. This is also allowed by the statute; see N. I. L., § 154.

[41] N. I. L., § 153.

any, or the fact that the drawee or acceptor could not be found."

Either the "noting" or this extension must be made on the day the instrument is dishonored. If the instrument has been duly noted on the day of dishonor, it may be extended any time thereafter, but when extended must be dated as of the day of the noting.

This record constitutes formal evidence in any court of the facts relative to dishonor recited in it.

The notary, as a practical matter, often gives formal notice of dishonor to the drawer and all indorsers, but not always. He may only notify the party who turned it over to him to protest, leaving it to such party to notify such others as he may desire.

CHAPTER IX.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

170. **Discharge by payment.**—Payment of a negotiable instrument made at the right time, to the right person, and by the right person, puts an end to the liability of all parties to the instrument and against all the world.[42]

According to the Negotiable Instruments Law, these results are reached: (1) By payment in due course by or on behalf of the principal debtor; and (2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.[43]

Payment by the primary obligor when the paper comes due is the ordinary way of extinguishing commercial paper. It calls for the payment of money at a certain time to a certain person. The promise, then, is fulfilled by making such payment. Payment after maturity, of course, has the same effect. But payment before maturity operates differently. It does not extinguish the paper. Hence, if B is the payee and A the maker of a note and A pays B before the note is due, but fails to take possession of the note, B may thereafter negotiate it to a holder in due course, C, and C may enforce payment against

[42] Bigelow, Bills, Notes and Cheques (2nd ed.), p. 269.
[43] N. I. L., § 119.

A.[44] A would, however, have a good defense against B or anyone not a holder in due course. Payment in advance is substantially a purchase of the paper, rather than a performance of the contract.

Payment by the accommodation party is in reality a payment by the party primarily liable, a payment by the one who ought to pay it, whether occupying the ostensible position of a primary obligor or not.

Payment to the right person. This also is important. If a note is made payable to A or order and A indorses it to B and C steals it and secures payment by representing himself to be B, the obligation is not discharged. The maker has not in fact performed his promise. Likewise, payment to the holder under a forged indorsement is ineffectual. But if the paper is payable to bearer the payment may be made to anyone who presents it, in the absence of knowledge that the holder is not entitled to it.

Payment by a party secondarily liable. This does not discharge the instrument. For example: A, the payee of a note, indorses it to B. Payment by A to B at or after maturity does not discharge the paper. A may in turn hold the maker, who has not as yet performed his obligation.

171. **Discharge by cancellation.**—The statute provides[45] that a negotiable instrument may be discharged "by the intentional cancellation thereof by

[44] But see the N. I. L., § 119, subsection 4, which provides further that any act "which will discharge a simple contract for the payment of money" will discharge a negotiable instrument. Construed strictly this would lead to a different result in the case supposed. But it is believed that the earlier law will be applied.

[45] N. I. L., § 119, subsection 3.

the holder," and, further,[46] that "a cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority."

Cancellation may be made by a destruction of the entire paper. The same result is accomplished by tearing out or marking out the signature, or by writing or stamping "paid" across the face of it, or by other means indicating an intention to cancel the obligation.

If the cancellation is made before maturity it must, in order to be effective against a holder in due course, be of such a character as to charge him with notice. And, further, in such case, it must be done in such a way that the instrument cannot be restored easily to its original condition. For example, if marked paid with an ordinary lead pencil and thereafter erased and transferred to a holder in due course, the cancellation would be of no effect.

172. **Discharge by alteration.**—The statutory provision is as follows:[47] "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course,

[46] N. I. L., § 123.
[47] N. I. L., § 124.

not a party to the alteration, he may enforce payment thereof according to its original tenor."

Prior to the statute there was a wide conflict as to the effect of alterations. Some courts held that a material alteration operated as a complete discharge, even as against a holder in due course. Others held that the instrument could be enforced according to its original tenor if the alteration was made by a stranger. The same is true if it was made innocently by a party.[48]

The statute thus changes the former law by making no distinction between an innocent and a fraudulent alteration.

A further question. Suppose the instrument is so drawn that the alteration is made easy. Prior to the statute some courts held that a holder in due course could recover for the full amount, as altered, if the paper were negligently issued in such form that the change could be easily made, as, for example, by writing the amount in lead pencil or so far from the dollar mark that other figures could be readily inserted. It has been said that the party putting the paper out in such form that it can be easily altered is estopped to deny liability.[49] The statute makes no provision for this situation.

173. **Same subject—Material alteration.**—"Any alteration which changes: 1. The date; 2. The sum payable, either for principal or interest; 3. The time or place of payment; 4. The number or the relations of the parties; 5. The medium or currency in which

[48] Bigelow, Bills, Notes, Cheques (2nd ed.), p. 207.
[49] Harvey v. Smith, 55 Ill. 224.

payment is to be made; or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration."[50]

174. **Discharge by renunciation.**—"The holder may expressly renounce his rights against any party to the instrument before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon."[51]

175. **Discharge of parties secondarily liable.**—It has already been seen that a party secondarily liable may be discharged by failure to make proper presentment and give due notice of dishonor.

The Negotiable Instruments Law provides that he may also be discharged:

"1. By any act which discharges the instrument;

2. By the intentional cancellation of his signature by the holder;

3. By the discharge of a prior party;[52]

4. By a valid tender of payment made by a prior party;

5. By a release of the principal debtor, unless the

[50] N. I. L., § 125; Harsh et al. v. Klepper, 28 Ohio St. 200.

[51] N. I. L., § 122.

[52] Not, however, by failure on the holder's part to notify a prior party of dishonor, it would seem.

holder's right of recourse against the party secondarily liable is expressly reserved;

6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."[53]

BIBLIOGRAPHY.

The standard treatises devoted exclusively to the law as it existed prior to the Negotiable Instruments Law are *Story,* Promissory Notes; *Story,* Bills of Exchange; *Tiedeman,* Commercial Paper; *Daniel,* Negotiable Instruments. Daniel's treatise, consisting of two volumes, is more nearly exhaustive of the subject and has been brought down to a more recent date by new editions than any of the others—the last edition being the fifth, published in 1903. The leading authorities dealing with the Negotiable Instruments Law are: *Benjamin,* Chalmers' Bills, Notes and Checks (2d American edition), a work which has as its basis *Chalmers'* Digest of the law in England and the Bills of Exchange Act, itself, of England; *Bigelow,* Bills, Notes and Cheques (2d ed.), which deals largely with the law as it existed prior to the statute but also quotes and refers to the statute, and which therefore is an excellent book for the student; *Bunker,* Negotiable Instruments, which contains the statute as adopted in Michigan, with annotations, but which is of value to the student anywhere because of the comments contained and a very general citation of authorities; *Brannan,* Negotiable Instruments Law (2nd ed.), containing the draft of the Uniform Negotiable Instruments Law, together with a complete and careful citation of authorities construing the statute and reprints of several splendid articles commenting upon the different provisions of the statute; and *Crawford,* Annotated Negotiable Instruments Law (3rd ed.), which was prepared by the draftsman of the Uniform Statute and which, therefore, is a valuable aid to the construction of the statute.

[53] N. I. L., § 120. See also Bunker, Negotiable Instruments (with annotations), pp. 175-177.

LAW OF SURETYSHIP AND GUARANTY

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PART I

INTRODUCTORY TOPICS

CHAPTER I.

CONTRACT DEFINED AND EXPLAINED.

1. **Suretyship and guaranty defined and distinguished.**—A contract of suretyship is a contract whereby one person, the surety, in becoming liable to pay a debt or perform an obligation to another person, the creditor, is entitled, if it is enforced against him, to be indemnified by another person, the principal debtor, who ought to have performed instead of the surety.[1]

The contract of suretyship takes on two forms: suretyship in the form of a collateral undertaking, when it is often known as a guaranty; or suretyship

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[1] Cooley, J., in Smith v. Sheldon (1876), 35 Mich. 42, 47, LEADING ILLUSTRATIVE CASES.

in the form of an independent or absolute undertaking when it is often called a contract of indemnity.[2]

Suretyship collateral in form or guaranty may be defined as a contract whereby one person, the guarantor, promises another person, the guarantee, to be answerable in the event of a third person, the principal debtor, making default in respect to a liability incurred or to be incurred by such third person to the promisee.[3]

Suretyship in the form of an independent or absolute undertaking, an indemnity, is a contract whereby the surety becomes bound primarily to the creditor to save him harmless independently of whether the principal debtor makes default or not.[4]

The distinction between suretyship which is collateral in form from that which is independent in form is that in the collateral contract the surety or guarantor undertakes that the principal shall perform, not that he, the surety, shall. His obligation is to pay the debt or damages in case the principal does not perform and the principal must default before the obli-

[2] This is the classification made by the late Professor Ames, formerly Dean of the Harvard Law School, in his excellent case book on suretyship. The analysis of the subject followed in this article is largely that used by Professor Ames in his case book.

[3] Edward Jenks, Digest of English Civil Law (by R. W. Lee), Bk. II, Part II, § 652. Campbell v. Sherman, 151 Pa. St. 70, LEADING ILLUSTRATIVE CASES.

[4] There is much confusion resulting from a careless and indiscriminate use of the words *surety, guarantor* and *indemnitor.* For example, the learned author of the article on Guaranty in the Cyclopedia of Law and Procedure (20 Cyc. 1413) treats the contract of suretyship as collateral, the same as that of guaranty. He says, "Contracts both of guaranty and suretyship fall within the statute of frauds as undertakings to answer 'for the debt, default, or miscarriage of another,' and must therefore be evidenced by a written memorandum in accordance with the provisions of the statute."

gation arises. On the other hand, the undertaking of the surety in the independent contract is independent of the principal debtor's obligation; his liability is not contingent upon the default of the principal debtor. He is bound to the creditor as an original debtor is bound, by the same terms and usually by the same instrument.

Suretyship as used in its broadest sense, in the sense as defined above in the definition first given, includes surety, indemnitor, guarantor, accommodation maker, indorser, and other persons whom the law treats as sureties.[5]

2. **General requisites of the contract.**—In general, to constitute the contract of suretyship or guaranty the same essentials are necessary as in any simple contract; thus, the parties should be competent to contract, their minds should meet in agreement, and the contract should be upon sufficient consideration unless made under seal.

3. **Who may become a surety or guarantor.**—In addition to natural persons of the requisite capacity, surety companies, or corporations authorized by statute to guaranty bonds and undertakings or the fidelity of officers in positions of public or private trust, may become sureties or guarantors.[6] Individuals becoming guarantors or sureties contrary to a statute or rule of court will be bound by their obligations. Thus an attorney would be bound by his contract though the statute or rule of court forbade attorneys

[5] Brandt, Suretyship and Guaranty, p. 3, note 1.

[6] Cramer v. Tittle, 72 Cal. 12; Hurd v. Hannibal, etc., R. R. Co., 33 Hun 109 (N. Y.).

from becoming sureties.[7] And a non-resident accepted as bail contrary to the statute was held bound by his contract.[8]

Married women cannot become sureties for their husbands or strangers in the absence of enabling statutes, and in general a married woman cannot charge her separate equitable estate by becoming a surety.[9] But where the enabling statute allows her to contract as a feme sole, or for any lawful purpose, she may become a surety.[10] In a few states statutes have been passed providing that a married woman cannot bind her estate by a contract of suretyship.[11]

4. **The necessity for consideration.**—Except when under seal, the contract of the surety or guarantor must be supported by a sufficient consideration, and this is determined by the same principles as govern in the case of the ordinary contract. The smallness of the amount of the consideration does not matter, so long as it is not such a consideration as would be opposed to public policy.[12]

If the guaranty is contemporaneous with the creation of the original liability, the same consideration will support the guaranty which supports the principal contract. In such a case the credit is given to both, and not to one alone, although only one may derive any substantial benefit from the transaction. But if

[7] Tessier v. Crowley, 17 Neb. 207; Kohn v. Washer, 69 Tex. 67.

[8] Commonwealth v. Ramsay, 2 Duvall 385 (Ky.).

[9] Yale v. Dederer, 18 N. Y. 265; Cartan v. David, 18 Nev. 310.

[10] Mayo v. Hutchinson, 57 Me. 546; Low Bros. & Co. v. Anderson, 41 Iowa 476.

[11] Nixon v. Whiteley, etc., Co., 120 Ind. 360; Beatie v. Calhoun, 73 Ga. 269; Sweazy v. Kammer, 51 Iowa 642.

[12] Davis v. Wells, Fargo and Co., 104 U. S. 159, LEADING ILLUSTRATIVE CASES; Rouse v. Mohr, 29 Ill. App. 321.

the guaranty is given after the principal contract is made, the guaranty must be supported by a new and independent consideration, unless it was given subsequently, in pursuance of a contemporaneous agreement to that effect.

Thus where the promise that a surety or guarantor will become liable is given as an inducement to the creditor to extend credit to the principal, this is a sufficient consideration to support the contract of the surety or guarantor who subsequently signs.[13] For example: "If A executes his note to B, and X, at the time the note is made, indorses his name on the back of it, he thereby becomes surety for A, the same as if he signed his name to the note with A, in the absence of an agreement in regard to the extent of the responsibility of X; and consequently there is a sufficient consideration for his promise. But if A executes his note to B, and X, having no concern with the note at the time that it is made, afterwards indorses his name on the back of it, he is not liable unless there was sufficient consideration therefor." [14]

A promise for a promise will be a sufficient consideration to support the contract of the guarantor or surety, as where the creditor agrees to extend the time of payment and the guarantor or surety thereupon agrees to be answerable for the debt.[15] But an executed consideration to the principal, that is, where the consideration is founded on something already done and passed, as on account of further time already

[13] Bank of Carrollton, Miss., v. Latting, 130 Pac. 144 (Okla.), LEADING ILLUSTRATIVE CASES.

[14] Swan's Treatise, p. 572.

[15] Fuller v. Scott, 8 Kan. 25; Lee v. Wisner, 38 Mich. 82.

given to the principal, such by-gone consideration is not sufficient to support the promise of the guarantor or surety, and the contract will be void, except where there was a previous request by the surety or guarantor to the creditor.[16]

If the written promise of the surety to answer for the debt of another be made in consideration of something to be done, as in consideration of goods to be supplied, legal proceedings to be stayed, and the like, the consideration is sufficient.[17]

5. **The negotiability of the contract of guaranty.**—The general rule is that a guaranty is not negotiable, but is a personal contract, which is, however, assignable, and may be sued upon by the assignee in his own name in those jurisdictions where an assignee can sue in his own name, and in those jurisdictions where he cannot sue in his own name, in the name of the assignor. If the guaranty is of a negotiable note, but is made upon a separate document, most courts hold that it is not negotiable. If the guaranty is made upon the negotiable note itself there is a considerable body of authority holding that it is negotiable, but the weight of authority holds that the guaranty is not negotiable even in that case.[18]

6. **Requirements of the Statute of Frauds.**—At common law it was not necessary that the contract of suretyship in the form of a collateral undertaking or guaranty should be in writing to bind the surety. An

[16] Williams v. Marshall, 42 Barb. 524 (N. Y.); Ludwick v. Watson, 3 Ore. 256; Ashton v. Bayard, 71 Pa. St. 139.

[17] Westhead v. Sproson, 6 H. & N. 728 (Eng.).

[18] 14 Harvard Law Review 229, note; 37 Amer. Dec. 270, note; 44 Amer. Dec. 308, note.

oral contract was as good as a written one. By the fourth section of the Statute of Frauds[19] and by statutes re-enacted in the various states in almost identical terms it is provided that "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such answer shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." The general effect of this section is that the contract of a guarantor, i. e., the contract of suretyship in the form of a collateral undertaking, being a promise to answer for the debt of another, must be in writing or suit cannot be maintained upon it.

7. **Extent of the writing necessary.**—As regards the extent of the writing necessary to satisfy the Statute of Frauds, there is much diversity of opinion in the various state courts. The general rule is that the memorandum must contain all the essential terms of the contract expressed with such certainty as to make resort to parol evidence unnecessary. The memorandum should show who the parties to the contract are; the express stipulations of the contract, as the price agreed to be paid for the property unless the memorandum states that the price has been paid, in which case the amount need not be set forth; the subject-matter of the defendant's engagement, the property which is bargained for must be described so that it may be identified; but the greatest controversy has

[19] 29 Charles II, chap. 3 (1676).

arisen over the question whether the memorandum must show the consideration for the defendant's promise.

8. **Statement of the consideration.**—The question was first decided in the English case of Waine v. Warlters, in which it was held that the memorandum must state the consideration. In this country there is a great diversity of opinion upon the doctrine of this case. In several states statutes expressly require that the consideration be stated in writing. In the majority of the states where the Statute of Frauds uses the word agreement, the courts have followed Waine v. Warlters and have held that the memorandum must state the consideration. In the statutes of those states in which the word agreement does not occur, but the word promise is used in its stead, the courts have generally dispensed with the necessity of stating the consideration. They have based their decisions upon the ground that as the statute requires only the promise to be in writing instead of the agreement, the statement of the consideration is not required by the statute. It would seem more in harmony with the policy of the Statute of Frauds, which is to prevent the false assertion against men of engagements which they never made, for the courts to have held a statement of the consideration to be necessary rather than to leave that part of the agreement to the "frail security of oral testimony."[20]

9. **Meaning of special promise.**—It will be observed that the Statute of Frauds requires a special promise to be in writing. This simply means an

[20] Browne, Statute of Frauds (5th ed.), §§ 386-398.

express promise. It is only the obligation of the guarantor that needs to be in the form of an express promise, not that of the principal. The statute renders unenforcible all verbal special promises but leaves unaffected all verbal debts. The line of distinction between suretyship as collateral in form and as an independent undertaking is that taken at common law between a special promise and a debt.[21]

The Statute of Frauds applies to the special promise, or the suretyship collateral in form, and requires a writing, but the statute has no application to a debt obligation—in other words, to a suretyship independent in form. The statute makes a verbal *special promise* unenforcible, but does not affect verbal debts. If the suretyship obligation is one for which the action of special assumpsit at common law would be the only remedy, the Statute of Frauds is applicable and a writing is necessary; but if debt or indebitatus assumpsit would lie, the statute has no application and a writing is unnecessary. One test, therefore, whether the transaction is within the statute is to determine whether the transaction constituted, at common law, a special promise or a debt.[22]

10. **Meaning of debt, default or miscarriage.**—The terms debt, default, or miscarriage, include not merely contract obligations but every obligation for which a person may become liable in a civil action. The obligation of the one primarily liable may be a tort or it may be a bailment, but the liability for which the guarantor makes himself responsible must

[21] Ames, 8 Harvard Law Review 263.
[22] Ames, 8 Harvard Law Review 263, 264.

be a clear and ascertained liability capable of being enforced against the principal.[23]

11. **Form of expression as a test of whether the promise is within the Statute.**—Whether the promise of the defendant is collateral, i. e., constitutes a guaranty or not, depends upon many circumstances. The form of the expression is important, but even the use of the word guaranty is not conclusive.[24]

"I will pay you if Smith will not," or, "I will see that Smith pays you," indicates a collateral promise. The obligation of the guarantor is never joint with the principal, while that of the surety in the contract of suretyship independent in form frequently is.[25]

12. **Non-liability of the principal as a test.**—There can be no guaranty where for any reason there is no obligation on the part of the one who purports to be primarily liable,[26] since there is no obligation to which the defendant's promise may be collateral. Thus where a defendant orally promised to pay the funeral expenses of a certain deceased person if the deceased's nephew did not, inasmuch as the nephew had never made himself liable for any such expenses, there was no principal obligation to which the defendant's promise could be collateral, and the court held the defendant's promise, although oral, could be enforced against him. It will thus be seen that one who purports to bind himself as a guarantor does not

[23] Read v. Nash, 1 Wilson 305 (Eng.); Kirkham v. Marter, 2 B. & A. 613 (Eng.); Buckmyr v. Darnall, 2 Lord Raymond 1085 (Eng.); Browne, Statute of Frauds (5th ed.), §§ 155, 156.

[24] Moorehouse v. Crangle, 36 Ohio St. 130.

[25] Gibbs v. Blanchard, 15 Mich. 292, LEADING ILLUSTRATIVE CASES.

[26] Mease v. Wagner, 1 McCord 395 (S. C.).

escape liability on the ground that there is no principal obligation, but for that reason his oral promise is brought without the Statute and is enforcible.[27]

The promise of one who agrees to answer for the debt or default of a married woman,[28] for one non compos mentis,[29] or for a corporation without capacity to incur the obligation in question, is not within the Statute of Frauds.[30] A majority of the cases, however, hold that a promise to answer for the debt or default of an infant is within the Statute of Frauds. The infant has capacity to contract, but has a personal right to disaffirm, which right he alone can exercise. The incompetency of the principal may cause the surety's promise to be independent in form and thus prevent him from escaping liability on his oral promise. If, however, the surety's promise is in reality collateral in form the surety escapes liability entirely, whether his promise is in writing or oral. His promise is merely accessory to that of the principal debtor and the nullification of the principal obligation carries with it that of the accessory.[31] It thus happens that the incompetency of the principal is sometimes important in determining whether the surety's undertaking is that of guaranty. If the promisee knows that the principal is incompetent, presumably he will want a surety that will protect him, as he has no binding obligation of the principal; if he thinks the principal is competent, an under-

[27] Eastwood v. Kenyon, 11 Adolphus & Ellis 438 (Eng.).
[28] Kimball v. Newell, 7 Hill 116 (N. Y.).
[29] Lee v. Yondell, 69 Tex. 34.
[30] Yorkshire Railway Wagon Co. v. Maclure, L. R. 19 Ch. Div. 478 (Eng.).
[31] See text, § 43.

taking of guaranty is all he may wish. Evidence of the promisee's knowledge of the competency or incompetency of the principal should, with other circumstances, be taken into consideration in interpreting the ambiguous language the surety has used in his promise to determine whether the promise is that of guaranty or suretyship absolute in form. That the guarantor's promise to answer for the debt or default of another must be collateral to a liability on the part of the principal is again illustrated by those cases in which the principal debtor's obligation is entirely discharged by the obligation of the one who purports to bind himself as surety. The liability of a principal to the promisee must continue after the guarantor makes his promise in order to make it possible that his promise come within the Statute of Frauds. The continuation of the principal's liability is a prerequisite to the existence of suretyship used in its broadest sense, and without such a suretyship obligation, of course, it is not possible to have guaranty.[32]

Thus where a debtor conveys property to a defendant who undertakes to pay the debtor's creditor and the creditor agrees that the defendant shall be substituted for the debtor, it is not possible to have a guaranty, for in such case the defendant has no right to reimbursement over against the debtor whose place he has taken.[33]

13. **The contract to indemnify.**—Where the contract to indemnify against certain acts involves no

[32] 1 Brandt, Suretyship and Guaranty (3rd ed.), §§ 66-69.

[33] Bird v. Gammon, 3 Bingham, New Cases, 883 (Eng.); Ames, Cases on Suretyship, p. 30, note 2 collecting cases.

duty upon a third person to indemnify the promisor, the Statute of Frauds clearly cannot apply. In order to have the Statute of Frauds apply there must be two obligations running to the same person, one of which is collateral to the other. Where there is no liability of a third party to which the defendant's promise to indemnify can be collateral, there can be no guaranty; for example, if the indorser of a dishonored note requests subsequent indorsees to bring suit against the maker, the indorser promising the indorsee that he will indemnify him for the costs of the suit, the oral promise of the indorser is enforcible, for it is not within the Statute of Frauds;[34] but where A promises B that if the latter will become surety for a debt owing by C to D, he, A, will reimburse B for any amount he may be compelled to pay by reason of such contract, a most difficult question arises. Upon this point there has been some confusion in the authorities. The contract to indemnify in this case is very like a contract of guaranty in many respects, for if B has to pay he will have two rights—one to be reimbursed by C, and the other to be indemnified by A. As between C and A it may be that C is the one who ultimately ought to stand liable for the debt. In Thomas v. Cook this case arose and the King's Bench in 1828 decided that A's promise did not come within the Statute of Frauds, Justice J. Parke saying that "if the plaintiff at the request of the defendant paid money to a third person, a promise to repay it need not have been in

[34] Browne, Statute of Frauds (5th ed.), § 159; Howes v. Martin, 1 Esp. 162 (Eng.).

writing, and this case is in substance the same." In Green v. Cresswell, a case involving the same question arose and the King's Bench in 1839 decided that the defendant's special promise to indemnify the plaintiff was within the Statute upon the ground that it was collateral to the third party's implied obligation to the like extent. While the cases are different in some of their facts, there is no sufficient basis for distinguishing them; Green v. Cresswell has been overruled and the law of England is now settled in conformity with Thomas v. Cook.[35]

The great weight of American cases is likewise in harmony with Thomas v. Cook, holding that a promise to indemnify one for all loss sustained by virtue of the latter's contract of suretyship is not within the Statute of Frauds. Various explanations have been made to justify this result. Browne, in his excellent work on the Statute of Frauds,[36] in explaining the basis of this rule which holds that the Statute of Frauds does not apply, says, "and perhaps it may be found in this, that the implied obligation of the third party exists only by force of and as incidental to the special contract between the plaintiff and the defendant. The defendant promises the plaintiff, that, if he becomes liable upon the actual default of the third party, he, the defendant, will protect him; and upon the plaintiff's becoming surety accordingly, the third party, as a legal consequence thereof, becomes also bound to protect him. There was not, however, any independent obligation or debt or duty of the third

[35] 2 B. & A. 119 (Eng.); Wildes v. Dudlow, L. R. 19 Eq. 198 (Eng.).
[36] § 162.

party to the plaintiff, to which the defendant's promise came in aid. And it may well be said that the Statute contemplated only obligations of the third party previously existing, or incurred contemporaneously with the defendant's special promise, or afterward, as the case may be, but always existing or to exist independently of any contract of guaranty between the plaintiff and defendant; an obligation which exists, or may exist, whether any contract be made between the plaintiff and defendant or not; not an obligation which comes into existence only as a legal incident of the contract which they have made. On this ground, it is believed, the doctrine that the Statute does not apply to promises to indemnify may rest; at least none so satisfactory or so consistent with the spirit of the statute is suggested in any of the cases." It would seem, however, that the explanation in Thomas v. Cook is sufficient. The promise to indemnify the plaintiff if he will become a surety for a third person to that third person's creditor, is, so far as the defendant's promise is concerned, equivalent to a promise to repay the plaintiff for money that he would pay to a third person. The defendant's obligation rests upon his promise to repay the plaintiff for doing something at the defendant's request. The fact that the doing the thing requested results in giving the plaintiff a right of action against a third person as well as against the defendant, does not change the nature of the defendant's promise.

14. **Promise to pay his own debt.**—Where the defendant's promise is in reality a promise to pay his own debt, the promise is not brought within the Stat-

ute of Frauds because in carrying out that promise he incidentally discharges the obligation of another; for example, where a man buys a team of horses and in payment of the horses makes a promise to the seller's creditor to pay the seller's debt to the creditor, that promise is not within the Statute of Frauds.[37]

15. **Promise to apply property in surety's hands.**—Where property of the principal debtor is in the hands of the defendant and the defendant makes a promise to the creditor, the promise must be interpreted with respect to two different situations that may exist. The agreement may be to apply the funds in the defendant's hands to the payment of the debt. If such is the promise, then clearly the promise of the defendant is not within the Statute of Frauds as it is not co-extensive with the obligation of the debtor. The defendant's sole obligation is to apply the funds or property to the payment of the debt. There is no undertaking on the part of the defendant to pay the debt and therefore his oral promise is enforcible.[38] On the other hand if the promise of the defendant is a promise to render himself liable personally to pay the debt, because he relies upon the fact that he holds this property of the debtor as a means of securing himself for his promise, his promise is to answer for the debt of another and must be in writing.[39]

16. **Promise in consideration of property transferred to the surety.**—Where property is transferred to the defendant for which the defendant undertakes

[37] Barker v. Bucklin, 2 Denio 45 (N. Y.); Brown v. Curtiss, 2 N. Y. 225; Cardell v. McNiel, 21 N. Y. 336.

[38] Belknap v. Bender, 75 N. Y. 446.

[39] Dock v. Boyd & Co., 93 Pa. 92.

to pay the debt of the transferor, two situations may arise. The defendant may be promising to answer for the debt of the transferor for the consideration received, the debtor still remaining primarily liable to his creditor. If such is the case then clearly the defendant's promise is collateral to that of the principal debtor and is within the Statute of Frauds and must be in writing. On the other hand, if the value of the property transferred to the defendant is practically equivalent to the debt he assumes, the suretyship relation has been inverted; if the transferor should pay the debt to the creditor he would be entitled to reimbursement from the defendant. The defendant thus becoming the one ultimately liable would clearly have no right to set up the Statute of Frauds on the ground that his promise to the creditor was collateral to that of the transferor.[40]

It is sometimes said that if the consideration for the new promise, i. e., the defendant's promise, moves from the creditor to the new promisor and the original debtor still remains liable for the debt, the promise of the defendant is not within the Statute of Frauds. It was stated in the case of Leonard v. Vredenburgh,[41] "where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties," the Statute of Frauds does not apply. The doctrine as thus stated must be repudiated as annulling the Statute of Frauds.[42] It is submitted

[40] Barker v. Bucklin, 2 Denio 45 (N. Y.).
[41] 8 Johns. 29 (N. Y.).
[42] Browne, Statute of Frauds (5th ed.), § 212.

that the question of consideration is immaterial as to whether or not the promise is within the Statute of Frauds. Of course the contract, as every contract, must be supported by a valid consideration and until we find a valid consideration it is useless to inquire whether or not the promise is within the Statute of Frauds. The whole question is, What is the promise? Neither the motive of the promisor nor the nature of the consideration affect this question. The question is, What is the substance of the transaction between the promisor and the promisee? The mere fact that the defendant has received property either from the promisee or from the debtor, does not take his promise out of the statute unless it appears he thereby incurred a debt. If the property transferred to the defendant was of sufficient value to indicate that his promise was to pay his own debt instead of that of another, the promise will not be within the Statute of Frauds. The mere fact that the defendant has received some benefit in consideration for his promise is not sufficient to show that he becomes a debtor; for example, in Mallory v. Gillett, one Haines owed the plaintiff a debt for repairs on a boat for which the plaintiff had a lien on the boat. The defendant promised the plaintiff orally in consideration of his relinquishing the lien, to pay the debt at some future time. The court correctly held that this was a promise to answer for the debt of another and therefore within the statute.[43] This case represents the weight of authority in the United States.[44]

[43] 21 N. Y. 412.

[44] Ames, Cases on Suretyship, p. 84.

PART II

RIGHTS OF THE SURETY

CHAPTER II.

THE RIGHT TO INDEMNITY AND CONTRIBUTION.

17. **Surety's rights in general.**—In general the surety has four distinct rights. These are—rights to indemnity, contribution, subrogation, and exoneration. The right to indemnity is a right which the surety has, when he has paid the creditor something on the debtor's obligation, to recover reimbursement for the payments made and for any loss incurred by him under the contract of suretyship, in consequence of the debtor's default. The right to contribution is a right which the surety has to recover from his co-surety or co-sureties when he has discharged more than his proportion of the debtor's liability. The right to subrogation is the right of the surety who has discharged the debtor's liability to the creditor to stand in the place of the creditor to use his remedies, to be entitled to his preferences against the estate of the principal debtor, to use the securities the creditor has, and in the creditor's name to obtain from the debtor or co-sureties indemnity in whole or in proportion to the loss sustained by him. The right to exoneration is the right the surety has when the debt falls due to compel his debtor to discharge

the debt, or his co-sureties to bear their proportion of the burden.

18. **The surety's right to indemnity—In particular—Nature and origin of the right.**—The surety's right to indemnity had its origin in equity. The action was allowed in equity a long time before it was allowed at law.[45] The action is now allowed at law, and where the common-law forms of action have not been abolished the action is indebitatus assumpsit, on an implied promise, on the part of the principal, to indemnify the surety as money paid out to the debtor's use. The right of action by the surety against the principal does not accrue until he pays the debt of the principal.[46] This being so, the surety could not bring an attachment or hold property in his hands not appropriated for the payment of the debt, until he had actually paid the debt.[47] The surety may pay the debt before due and sue the principal for indemnity after it has become due.[48] The action for indemnity should be brought in the name of the surety and not in the name of his obligee.[49] No demand or notice need be made or given to the principal by the surety who has paid the debt before suit is brought for indemnity.

19. **When the right arises.**—The surety's right arises at the time he becomes surety; for example, he may complain of fraudulent conveyances made by

[45] Ford v. Stobridge, Nelson Ch. 24 (Eng.); Scot v. Stephenson, 1 Lev. 71 (Eng.); Layer v. Nelson, 1 Vernon 456 (Eng.).

[46] Cotton v. Alexander, 32 Kan. 339; In re Estate of Hill, 67 Cal. 238.

[47] Dennison v. Soper, 33 Iowa 183; Ingalls v. Dennett, 6 Greenl. 79 (Me.).

[48] White v. Miller, 47 Ind. 385.

[49] Hardware Co. v. Deere, etc., Co., 53 Ark. 140.

the principal debtor after he has entered into the contract of suretyship and before performance of his duty on the contract. Again, where a surety dies and leaves a legacy to the principal debtor and the legacy is assigned before the surety's estate pays the debt, the assignee of the legacy takes the assignment subject to the right of the surety's estate to reduce the legacy by the amount due from the legatee. As regards the principal's right to exemption or the claim of third parties to the principal's property, the surety's right to indemnity relates back to the time when he signed the contract and became surety, and his equity against the principal's property will be protected from damage by the claims of subsequent creditors.[50]

20. **When the surety may bring an action for indemnity.**—While it is clear that the surety's right exists from the time he becomes surety, it is equally clear that he has no cause of action for reimbursement until he has made some payment on the debt. A partial payment of the debt is sufficient to give him a cause of action.

The surety may pay a part of the debt when due, or pay it in installments, and recover after each payment a like sum from the principal;[51] but unless the contract so provides, he cannot recover after each installment paid.

The surety need not pay the debt of the principal in cash, but any form of payment accepted by the

[50] Barney v. Grover, 28 Vt. 391; Rice v. Southgate, 16 Gray 142 (Mass.).

[51] Davies v. Evan Humphreys, 6 Mees. & Wels. 153 (Eng.), LEADING ILLUSTRATIVE CASES.

creditor as absolute payment will answer to support his right to sue the principal for indemnity. Thus the surety may pay with his negotiable note, or the delivery of property, or a mortgage thereon to the creditor, will constitute payment.[52] For example, in Barclay v. Gooch,[53] a surety gave his negotiable note in conditional payment of the debtor's debt and before he paid out any money he sued the debtor and was allowed to recover. While this represents the law, it does not seem to be defensible on principle. First, it makes an unwarranted distinction between a negotiable and a non-negotiable note,[54] and further, it is in conflict with the principle which we will have stated further on, that a surety in paying his debtor's debt is not entitled to recover the face value of the debt if he settled with the creditor for a less sum.

For example, if a surety becomes surety on a $2,000 note and settles it by a payment of $1,000 in cash, he is able to recover from the principal only $1,000. But in Barclay v. Gooch,[55] a surety who gives his own negotiable $2,000 note in payment of the $2,000 debt of his debtor may turn immediately upon his debtor and recover $2,000, and, when his note becomes due, settle with the creditor by paying less than the face of his note, possibly $1,000. On principle it seems the surety should not be entitled

[52] Sapp. v. Aiken, 68 Iowa 699; Peters v. Barnhill, 1 Hill 234 (S. C.); McVicar v. Royce, 17 Up. Can. (Q. B.) 529 (Can.).

[53] 2 Esp. 571 (Eng.).

[54] A non-negotiable note accepted in conditional payment will not entitle the surety to sue the debtor before the note is paid.

[55] Same as note 53.

to recover reimbursement until he has been out something.[56]

21. **The amount the surety may recover on his right.**—The doctrine which permits a surety who has purchased the principal debtor's obligation, to be subrogated to the position of creditor and sue the debtor, but limits his recovery to the amount the surety has paid for the obligation, is based upon the idea that a surety is a fiduciary to the debtor and can therefore have reimbursement only for what he has paid. He is in a position similar to that of a trustee who when he takes up a note of his cestui que trust has reimbursement only for what he pays because of the fiduciary relation which he occupies. Similarly the law considered that the surety should not be allowed to speculate upon his principal. So the surety cannot recover indirect or consequential damages for his loss by reason of having to pay the debt of the principal, or for sacrificing his property, or for being imprisoned, but simply the amount actually paid out in settlement of his principal's debt, with necessary costs.[57]

For example, it was held in the case of Succession of Dinkgrave that a surety who purchased the obligation of his debtor to the extent of $2,500 for $750 could recover from his principal only the $750, not the $2,500.[58] By agreement with the principal the surety may recover a stipulated sum for

[56] Coggeshall v. Ruggles, 62 Ill. 401; Hicks v. Bailey, 16 Tex. 229; Feamster v. Withrow, 12 W. Va. 611.

[57] Powell v. Smith, 8 Johns. 249 (N. Y.); Vance v. Lancaster, 3 Hayward (Tenn.) 130; Brandt, Suretyship and Guaranty (3rd ed.), § 234.

[58] 31 La. Ann. 703.

the use of his credit.[59] The surety's action against the principal is generally that of assumpsit, and if there are two or more principals, unless stipulated to the contrary, the surety may sue all of them, or any one of them, for indemnity.[60]

22. **The equitable right to recover indemnity not dependent upon contract.**—One who has become surety without the request of the principal, express or implied, cannot get indemnity in an action of assumpsit against the principal upon payment of the debt,[61] but in equity the surety may recover indemnity against a principal who has objected to his becoming a surety on the debt. Thus, in Mathews v. Aikin,[62] at the request of the mortgagee and against the advice of the son, a father became a surety on a bond secured by mortgage given by his son. The father, having had a sum collected from him on a suit upon the guaranty, was allowed to be subrogated to the rights of the holder of the bond and mortgage. It was insisted on the part of the principal debtor that the surety should have no right over against the debtor, as he had not become a surety at the request of the debtor. The court, however, allowed the surety to recover. If the surety were limited to his right at law to recover indemnity from the principal, it would be difficult to spell out an implied contract, but in equity the surety's right is not worked out on principles of contract.

A mere volunteer who is under no legal obligation

[59] Perrine v. Hotchkiss, 58 Barb. 77 (N. Y.).
[60] Hulett v. Soullard, 26 Vt. 295; Babcock v. Hubbard, 2 Conn. 536.
[61] Carter v. Black, 20 N. C. 561; 4 Dev. & Bat. 425 (N. C.).
[62] 1 N. Y. 595.

to pay the debt cannot recover indemnity from a principal if he pays the debt. He must at least be under a prima facie legal obligation to pay the debt.

23. **Defenses to the right to indemnity.**—Where the surety knows that neither he nor the principal debtor is liable, and yet pays the debt, he cannot recover indemnity from the principal. This is true universally where the defenses of the surety and debtor are meritorious, such as fraud, illegality, duress, and payment, but where the defense of the principal and surety is technical, there is some confusion in the authorities. If both have the defense of the Statute of Limitations or the Statute of Frauds, and the surety pays knowing it, the surety may not by the majority rule recover reimbursement.[63] If the defense is one available only to the principal, the surety is of course under obligation to pay and may have reimbursement, but if the defense is available to the surety only, he may waive it; then by paying the debt he relieves the debtor of a burden and should and is by the weight of authority permitted to have indemnity. Of course, if the surety waits after he has paid the debt until the Statute of Limitations has run, his right to recover indemnity will be barred.[64]

24. **Definition and origin of the right to contribution.**—The right to contribution is a right which the surety has when he has discharged more than his proportion of the debtor's liability to recover from a co-

[63] Stone v. Hammell, 83 Cal. 547, 23 Pac. 703, 8 L. R. A. 425, 17 Am. St. Rep. 272.

[64] Beal v. Brown, 13 Allen 114 (Mass.); see foot-notes, Ames, Cases on Suretyship, pp. 512-513, 520.

surety or co-sureties. The creditor is not bound to look to all the sureties jointly, but may compel payment from any one, and his election to do so gives rise to the principle of contribution. The basis of contribution is equitable. Where one surety, who has become so with others, has been compelled to pay the whole debt thrown upon him by the choice of the creditor, it is only justice that he have contribution from those who entered into the obligation with him. This obligation of the co-sureties to contribution is not founded on contract between them, but stands upon a principle of equity which was long acknowledged and enforced in equity courts before the courts of law assumed jurisdiction. Contribution was allowed in equity for more than a century before it was recognized at law.[65]

25. **Differences between the legal and equitable right to contribution.**—There still exists a difference in the legal and equitable remedies for contribution. At law, when the surety sues for contribution and part of the co-sureties are insolvent, he can recover from the solvent co-sureties only their proportionate share, ascertained by dividing the whole sum paid by the whole number of sureties, regardless of those who are insolvent;[66] but in equity he may recover a larger

[65] Wormleighton and Hunter's case (1613), Godbolt 243 (Eng.); Fleetwood v. Charnock (1629), Nelson 10 (Eng.). The first judicial intimation that a surety might sue at common law for a contribution is believed to be the following remark of Lord Kenyon [Turner v. Davies (1796), 2 Esp. 478] (Eng.), "I have no doubt, that where two parties become joint sureties for a third person, if one is called upon and forced to pay the whole, he has a right to call on his co-sureties for contribution." Carrington v. Carson, Cam. & N. Conf. R. 216 (Eng.), Cowell, Admr. of Cowell v. Edwards (1800), 2 Bos. & Pul. 268 (Eng.); Ames, Cases on Suretyship, p. 537, note 1.

[66] Acers v. Curtin, 68 Tex. 423.

portion from the solvent co-sureties. The amount of contribution in equity is ascertained by dividing the whole amount he has paid by the number of solvent co-sureties.[67] Lord Eldon, C. J., in Cowell v. Edwards,[68] says "that no more than an aliquot part of the whole, regard being had to the number of co-sureties, could be recovered at law by the defendant; though if the insolvency of all the other parties were made out, a larger proportion might be recovered in a court of equity." In the action at law for contribution it is not necessary to aver or prove the insolvency of the principal, but in a suit in equity for contribution, recovery can not be had unless the principal is shown to be insolvent. This refusal of the court of equity to allow contribution when the principal is solvent rests upon natural justice, and the prevention of a multiplicity of suits, for the sureties if recovered against would in turn sue the principal. The right to contribution at law rests upon practically the same grounds that it rests upon in equity; a contract implied in law on the ground of justice and a refusal by the courts of law to allow contribution where the principal is solvent would likewise prevent multiplicity of suits. As a matter of principle it would seem that courts of law should follow courts of equity in such cases and refuse contribution.[69]

If a co-surety is a non-resident person it has the same legal effect as if he were insolvent; in equity

[67] Burroughs v. Lott, 19 Cal. 125.
[68] 2 Bos. & Pul. 268 (Eng.).
[69] Brandt, Suretyship and Guaranty (3rd ed.), § 316.

the obligation is divided equally between the resident sureties.[70]

26. **When the right of action arises.**—In considering contribution the coming into existence of the right must be distinguished from the right to bring an action. The surety's right to contribution arises with his obligation, and any acts by the creditor after the surety has bound himself which injures this right of the surety will give the surety a defense to the extent of the contributive share with which the creditor has meddled. Thus if the creditor gives time to one of two sureties he gives to the other a defense to the extent he would have contribution from the one to whom it was extended.[71]

The right of action arises when the surety has paid more than his proportion of the principal's liability. For example, if there were two co-sureties for a $500 obligation, to entitle one of them to contribution he must have paid more than $250 of the principal debt, and he could then recover all above $250 that he had paid. Until he has paid more than his proportion the right of action does not arise. It will be observed that this differs from the right to recover indemnity from the principal debtor. In the case of indemnity the surety's right arises against the principal as soon as he has paid something on the debt. This distinction between the time in which the right of action for contribution and the right of action for indemnity arises is well brought out in cases where the Statute of Limitations has run on the claim of the surety

[70] Stewart v. Goulden, 52 Mich. 143.

[71] See also § 29 of the text.

against the debtor but has not run on his claim against the co-sureties. For example, suppose one of two equal co-sureties on January 1, 1900, pays $100 on a $500 debt of the principal debtor. The surety has a right of action any time after January 1, 1900, against the principal debtor for indemnity, but he has not yet any right of contribution against his co-surety. Such right will arise only when he has paid more than his proportion of the principal's debt, which will not be until after he has paid more than $250 in the case supposed. Now if on January 1, 1905, the surety who paid the $100 in 1900 pays $400 more on the debt of the principal, a right of contribution from his co-surety arises from this later date. If the surety waits until 1910, supposing a six years' Statute of Limitations, before he brings an action, his right of indemnity against the principal will be $400, not $500, for the Statute of Limitations has run in favor of the principal for the first payment of $100, but his right to sue for contribution would not arise until 1905, so he can recover in full on that, i. e., $250.

If a surety settles the claim of the debtor for less than its face value he can recover contribution only on the basis of what he has paid, not on the basis of what he has discharged. Thus if he settles a $500 debt for $400 his right to contribution is only for $200, not $250.[72]

27. **Who are co-sureties.**—Where all the sureties sign the same instrument and become equally liable thereon there is no question of their being co-sureties, but there may be two or more sureties for the same

[72] Tatum v. Tatum, 1 Ired. Eq. 113 (Eng.).

principal who are not co-sureties. If several persons become bound for the same debt or obligation of the same principal, though at different times and by different instruments, they are considered as co-sureties.[73] Where a person signs a note as the principal and surety has signed and adds to his signature, "security for the above parties," he is not a co-surety with the surety who has already signed, since he has qualified his contract to become a surety for the two,[74] and even if he had not added the words "security for the above parties," parol evidence could be used to show that he signed the contract not as a co-surety with the surety who had signed, but as surety for those already bound. Again, parol evidence may be used to show that the indorser of a promissory note is a co-surety with the surety who signs with the maker,[75] and it is a general rule that parol evidence will be admitted to show the real relation subsisting between several parties bound for the performance of a written obligation. A parol agreement of one surety to indemnify the other may be shown to defeat the right to contribution.[76] The fact that one surety signs before another is not enough to create a presumption that the one who signs first should exonerate the other. However, in the absence of evidence to the contrary, by the weight of American cases successive accommodation indorsers of negotiable instru-

[73] Woodworth v. Bowes, 5 Ind. 276; Deering v. Earl of Winchelsea, 2 Bos. & Pul. 270 (Eng.).

[74] Harris v. Warner, 13 Wend. 400 (N. Y.).

[75] Nurre v. Chittenden, 56 Ind. 462.

[76] Brandt, Suretyship and Guaranty (3rd ed.), § 287; Craythorne v. Swinburne, 14 Ves. 160 (Eng.).

ments are not co-sureties and a prior accommodation indorser will not be allowed to have contribution from the subsequent indorser.[77]

28. **Contribution not based on contract.**—Contribution does not rest upon contract. Frequently contribution is allowed although the sureties have become such involuntarily. Thus in McBride v. Potter-Lovell Co.,[78] the Potter-Lovell Co. held the notes of several parties which it had received from them for sale; instead of selling the notes for the benefit of the makers, as they had agreed, the Potter-Lovell Co. fraudulently pledged the notes to a bona fide purchaser without notice. The court said: "All of the various parties whose names were thus fraudulently pledged stood on the same footing except that the notes were pledged at different times, fell due, and were collected at different times. * * * These differences do not vary the equitable rights and liabilities of the parties as amongst themselves. The liability to contribute does not depend on a contract between the parties who are held liable to contribute, and is not affected by the fact that notes were pledged and fell due and were paid at different times, or that some of them were paid only in part, or not at all. The notes were all pledged to secure the same indebtedness. The fact that some of them fell due at earlier dates than others creates no equity in favor of those which fell due last. * * * It might be that under such circumstances the pledgee would prefer to hold

[77] McDonald v. Magruder, 3 Peters 470 (U. S.), and cases collected in foot-note 1, Ames, Cases on Suretyship, p. 491; Harris v. Jones, 136 N. W. 1080 (N. D.), LEADING ILLUSTRATIVE CASES.

[78] 169 Mass. 7.

one and exonerate another, and he would have power to do so in the first instance by proceeding to collect of one but not of another. But where several different parties have thus been exposed to loss by the fraud of their common agent, it is more equitable that the burden of the loss should be shared pro rata. Under such circumstances equality is equity, without respect to the time of the maturity of the notes. * * * All the notes being pledged as security for the same indebtedness, the whole loss in consequence thereof is to be borne by all the makers in proportion to the amounts of the notes so pledged.'"[79]

This principle that contribution does not rest upon contract is again illustrated by the case where one is bound as surety without knowing of the existence of co-sureties. He may even in such case recover contribution from the co-sureties.[80] So where there is an obligation with sureties who have been given securities by the obligor for their protection and sureties come in afterwards without any arrangement for security, these later sureties are protected also by the securities given for the protection of the original sureties. Suppose there is a debt of $1,000 and B, the debtor, gives C, the surety, securities to the extent of $1,000, and suppose the creditor collects the old debt from D, who came in later as a co-surety with C, without knowledge that C was a surety or that he held securities. Now, if B is insolvent, D has a right against C for contribution to the extent of $500. He also has the right, if he does

[79] McBride v. Potter-Lovell Co., 169 Mass. 7; Ames, Cases on Suretyship, p. 550.

[80] Brandt, Suretyship and Guaranty (3rd ed.), § 284.

not wish to sue for contribution, to use up all of the securities in reimbursing himself. On the other hand, if C should pay the debt he will have a right to use the securities to reimburse himself. If C, however, paid only $500 on the debt and D paid the other $500, C would have to turn over to D one-half of the proceeds of the securities which were deposited by B with C exclusively for C's protection. D is allowed to have a right against these securities because of the fiduciary relation which exists between the co-sureties and because contribution is based upon an equitable principle of justice independent of contract. The contribution is given even though not intended by the parties. A surety who comes in after there are sureties already obligated will be entitled to contribution against those already bound. In the absence of agreement to the contrary, co-sureties are bound to contribute according to the number of co-sureties, at least where they are all solvent. But the co-sureties may be bound in different amounts for the same obligation; thus on a $2,000 debt one may be bound for $2,000 and the other for $1,000. In case of default for $2,000, they are liable in proportion to their respective obligations. If the one liable for $2,000 pays for the whole default he can recover one-third of the $2,000 from the other surety who is bound for $1,000.[81] Where the sureties are on separate bonds there may be a right to contribution. Where two bonds are signed by sureties as security for the same debt —say, one bond is for $1,000, signed by three sureties, and the other for $500, signed by three sureties, and

[81] Armitage v. Pulver, 37 N. Y. 494.

the principal defaults for $600—the loss among the sureties must be apportioned by using the face of the bonds as a unit to determine the proportion each is to contribute. Thus in the first bond the sureties of the first group will stand two-thirds of the loss and the sureties of the second group, one-third. If a surety on the bond No. 1 is insolvent and two on the bond No. 2 are insolvent, then each of the three solvent sureties would pay $200.

29. **Defenses to the action for contribution.**—Where one of the sureties has done something that would make it inequitable to recover contribution from the other surety, contribution will not be enforced, since it is an equitable right in its foundation, and he who would have equity must do what equity demands.[82] Where one of the sureties by stifling competition bought the land of the principal for less than it was worth and made payment of the debt, he was held not entitled to contribution from the co-sureties. If the surety who pays the debt releases the principal debtor from liability to indemnify him, this gives the co-surety a defense to his action for contribution; likewise a release of one co-surety will thereby give the other co-sureties a defense to the extent that they would be entitled to contribution from the surety released. If one of the two co-sureties consents to the giving of time to the principal and the other does not, and the one consenting afterwards has to pay the debt, he cannot later recover contribution from the one who did not assent.[83] If a surety releases his lien

[82] Dennis v. Gillespie, 24 Miss. 581.

[83] Brandt, Suretyship and Guaranty (3rd ed.), § 306.

or negligently loses it, it gives his co-surety a defense to the extent the co-surety would have a right to reimburse himself out of the securities thus released or lost.[84] A surety who pays a debt of a principal against which he knows the principal has a meritorious defense cannot have contribution from his co-sureties. Thus a surety who with knowledge pays a note which is void for usury or because it was obtained by fraud is not entitled to contribution from a co-surety on the note. If the surety, however, with knowledge pays a debt to which the debtor has a technical defense he may recover contribution from a co-surety. The surety who pays such debt with notice of the defense may recover contribution from his co-surety or co-sureties.[85]

[84] Ramsey v. Lewis, 30 Barb. 403 (N. Y.); Carpenter v. Kelly, 9 Ohio 106; Brandt, Suretyship and Guaranty (3rd ed.), §§ 297-298.

[85] Brandt, Suretyship and Guaranty (3rd ed.), § 293.

CHAPTER III.

THE RIGHT TO SUBROGATION AND EXONERATION.

30. **Definition and nature of the right to subrogation.**—The right to subrogation is the right of the surety who has discharged the debtor's liability to the creditor to stand in the place of the creditor and to use his remedies, to be entitled to the creditor's preferences against the estate of the principal debtor, and to use the securities the creditor has and in the creditor's name to obtain from the debtor or co-surety indemnity in whole or in proportion to the loss sustained by him.[86] Subrogation is strictly an equitable doctrine, and it can only be enforced in courts of equity.[87]

31. **The right to be subrogated to the securities held by the creditor for the payment of the debt.**—Upon satisfying the debtor's obligation to the creditor, the right of the surety to be subrogated to the collateral securities held by the creditor for the pay-

[86] Subrogation is defined in "A Digest of English Civil Law" by Edward Jenks (1907), Book II, Part 2, § 667, as follows: "The surety who has discharged the principal debtor's liability to the creditor is entitled to have assigned to or in trust for him every security held by the creditor in respect of such liability, and to stand in the place of the creditor, and to use all the creditor's remedies, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding, in order to obtain from the principal debtor or any co-surety indemnity, in whole or in a just proportion, for the loss or liability sustained by him. Mercantile Law Amendment Act, 1856, s. 3; Bechervaise v. Lewis (1872), L. R. 7 C. P., at p. 377.

[87] Smith v. Harrison, 33 Ala. 706; Brandt, Suretyship and Guaranty (3rd ed.), § 324.

ment of the debt, is almost universally recognized.[88] This right of the surety exists independent of any contract and the surety is entitled to use collateral securities which he knew nothing of when he contracted. It makes no difference whether the securities were given by the principal debtor for his security before or after the surety became bound. He is in each case entitled to use these securities when he has once paid the debt which the debtor should have paid in the first place.[89] The surety is entitled to be subrogated to the rights under a mortgage given by the principal to the creditor in respect to the debt, and may with or without a formal assignment of such mortgage have it foreclosed, in his own name, and apply the proceeds to indemnify himself.[90]

If property is sold and the terms of the sale are that legal title is to remain in the vendor until the purchase money is paid, the relation between the seller and buyer is substantially that of a mortgagee and mortgagor and the surety for the buyer on paying the purchase price is subrogated to the seller's right as mortgagee.[91]

This right to avail himself of the securities held by the creditor exists in the case of a surety for a vendee where the vendor retains a lien on the land conveyed. The right of the surety to use the creditor's securities applies in the case of a corporation's lien on the

[88] Goddard v. Whyte, 2 Giff. 449 (Eng.); see Ames, Cases on Suretyship, p. 358, foot-note.

[89] Ames, Cases on Suretyship, p. 358; Pearl v. Deacon, 24 Beav. 186 (Eng.), LEADING ILLUSTRATIVE CASES.

[90] Gossin v. Brown, 11 Pa. St. 527; McLean v. Towle, 3 Sandf. Ch. 117 (N. Y.); Beaver v. Slanker, 94 Ill. 175.

[91] Ames, Cases on Suretyship, p. 360, note.

shares of stockholders and in case of statutory liens. The right is available wherever the creditor has securities, no matter in what form, which he may use for his protection or for satisfaction of his claim against the principal debtor.[92]

So a third person taking property of the principal with notice of liens available to the surety on his right to subrogation will take such property subject to all the equities which the surety acquires by subrogation. Thus land of the principal debtor sold subject to the creditor's judgment lien is not freed from the burden of the lien when the surety pays the debt, for the lien is kept alive in equity to protect the surety on his right to subrogation.[93]

The sureties of officers, administrators, guardians, and the like, are entitled to be subrogated to such rights as the obligees may have against the principals. And the sureties of a guardian may be subrogated to the remedies of the ward against such guardian before judgment and execution against him, if they are legally bound to pay, or where the principal is insolvent before payment.[94]

To be subrogated to the lien of the state or county, where such lien is statutory, the surety must allege and prove his right of subrogation and the extent of it.[95] Otherwise the surety is entitled to be subrogated to the rights of the state or county and have them

[92] Ames, Cases on Suretyship, p. 361, note.

[93] Drew v. Lockett, 32 Beav. 499 (Eng.); Hill v. King, 48 Ohio St. 75; Douglass' Appeal, 48 Pa. 223.

[94] Brandt, Suretyship and Guaranty (3rd ed.), §§ 350-352; Fishbeck v. Weaver, 34 Ark. 569.

[95] Watts v. Eufaula Natl. Bank, 76 Ala. 474.

enforced for his benefit as in the case of individual creditors.[96]

A surety for a part of a debt is not entitled to be subrogated to a security given the creditor by the principal at another time, and for a separate and distinct part of the same debt.[97]

32. **The right to subrogation is sometimes available where the right to indemnity is not.**—It frequently happens that a surety will be unable to use or obtain relief through his right to indemnity, but will be protected through his right to subrogation. For example, an administratrix had in her hands, belonging to the estate, some money which was subject to distribution among the creditors of the estate. The judge of probate ordered distribution and the administratrix failed to make it and instead invested the fund in a piece of property which she used and occupied as a homestead. The creditors of the estate obtained a judgment against her and her sureties. Upon a surety paying the obligation of the administratrix and suing for reimbursement, he attempted to get satisfaction out of the homestead. The surety was not allowed to do this because the homestead is not subject to ordinary debts and the obligation of the administratrix to indemnify the surety is only a debt obligation. Now, the creditors in such a case as this have the right to follow the misappropriated money held by the administratrix as a trust fund for the payment of debts into this homestead estate, and the surety, when he sues on

[96] Boltz's Estate, 133 Pa. St. 77.
[97] Wade v. Coope, 2 Sim. 155 (Eng.).

his right to subrogation, may use this right of the creditor to follow this trust fund into the homestead. The surety was thus permitted to reach by his right to subrogation what he could not get by his right to reimbursement.[98] Again, a surety for a trustee who defaults and sells the trust property to a purchaser with notice of the breach of trust is subrogated to the rights of the trustee on payment of the cestui que trust's claim to recover back the property. Where a guardian wasted funds and the ward recovered from the guardian's surety the amount the guardian was in default, and the guardian then became bankrupt, the surety could not sue the guardian for indemnity, as he had paid the guardian's claim to the ward before bankruptcy, and it would be a provable claim which would have been discharged in bankruptcy; but the surety would have a right to recover against the guardian on the ward's right, which was one in the nature of a trust, not discharged by bankruptcy of the debtor and kept alive even after payment by the surety for his benefit.[99]

Where a surety for a sheriff was obliged to pay the state for the default of the sheriff in failing to make return of taxes on a judgment obtained by the state against both the sheriff and the surety (the state's judgment being prior to all other judgments), the surety was allowed priority by being subrogated to the preference of the state against the sheriff.

33. **The right to be subrogated to the specialty obligation which the creditor holds.**—When a surety

[98] Pierce v. Holzer, 65 Mich. 263.
[99] Halliburton v. Carter, 55 Mo. 435.

pays the debt of the principal debtor the obligation is extinguished at law. This is no truer in the case of a specialty debt or judgment than in the case of an ordinary debt. However, the surety is allowed to realize upon the obligation to the creditor, which has been discharged at law, by virtue of the fact that equity keeps this obligation alive for the purpose of giving the surety his right to subrogation. As the right to subrogation is particularly an equitable right based upon justice it would seem that equity should keep this obligation alive until the sureties are allowed to enforce their right against those parties who should ultimately bear the burden. There is no doubt but what the obligation is kept alive for the purpose of permitting the surety to recover upon the securities held by the creditor. It, however, was one time doubted in England, in the case of Copis v. Middleton,[1] whether a specialty debt would be kept alive for the benefit of the surety. This rule has been changed in England by statute so that the doctrine of Copis v. Middleton no longer prevails there, and it is the rule now almost everywhere in this country as well as in England that a surety who pays a specialty debt of his debtor is subrogated to the rights of the creditor to realize upon the specialty.[2] The right to subrogation does not give the surety a right to speculate upon his debtor. It is true that a surety who has paid the principal debtor's obligation is subrogated to the position of the creditor and may sue

[1] Turner & Russell 224.

[2] Litterdale's Executors v. The Executor of Robinson, and cases collected in Ames, Cases on Suretyship, p. 386, note; Statutes 19 and 20 Victoria, c. 97, § 5.

the debtor in the name of the creditor upon the specialty which the creditor holds, but in bringing suit upon such instrument the surety's recovery is limited to the amount he has paid for the obligation. This limitation upon the surety's equitable right to subrogation is based upon the idea that the surety occupies a position as fiduciary to the principal debtor and therefore can recover no more than he has been out of pocket. A trustee who takes up a note of his cestui que trust can recover no more reimbursement than he paid the creditor, and this is on the ground that he occupies a fiduciary relation towards his cestui que trust. Similarly on principle the surety should not be allowed to speculate upon the principal debtor. Thus a surety who purchased the obligation of his debtor, the face value of which was $2,500, for $750, was allowed to recover only $750 from the principal debtor, although he was suing on his right to subrogation.[3]

34. **The right to subrogation is not dependent upon contract.**—While a mere stranger or volunteer cannot by the payment of a debt of another be entitled to subrogation, the surety or guarantor of a debt is entitled to subrogation upon payment of the debt without any stipulation for it.[4] For example, an insurance company pays a loss on insured property destroyed by a railway company. Without any assignment of the right of the injured party to sue the railway company or without any previous arrangements

[3] Succession of Dinkgrave, 31 La. Ann. 703; Waldrip v. Black, 74 Cal. 409; cases collected in foot-note, Ames, Cases on Suretyship, p. 339. But see Carpenter v. Minter, 72 Tex. 370.

[4] Burton v. Mill, 78 Va. 468; Miller v. Stout, 5 Del. Ch. 259.

in the insurance policy, when the insurance company pays the loss caused by the fire it is subrogated to the rights of the insured person to recover against the railway company for the loss sustained. If the insured should release his claim against the railway company it would preclude his holding the insurance company upon their contract, for by releasing the railway company he would be destroying the insurance company's right to subrogation through him against the railway company. The payment by the surety discharges the debt as to the creditor at law, but the debt remains in force in equity, so that the surety may come against the debtor by use of his right to subrogation and thus compel the party who ultimately should bear the burden to do so. The mere payment by the surety without assignment of the original evidences of the debt or the judgment into which the debt has been merged operates according to the better view as an assignment to the surety of the creditor's right to sue.

35. **Right to be subrogated to a judgment against the debtor.**—As regards the right of the surety who pays the debt after the same has been reduced to a judgment to be subrogated to such judgment, there is a conflict among the authorities. If the payment is made with intention of extinguishing the judgment it will of course have that effect and defeat subrogation. But if no such intention appears the better opinion is said to be that the judgment is discharged as regards the creditor's personal rights thereto, but kept alive as between all parties for the purpose of enforcing the rights of the surety. In the absence of

apparent intention in the payment it will be presumed to be the intention of the surety to keep the judgment alive for subrogation thereunder.[5] So it is held that if the surety pays the amount of the judgment and takes an assignment of it, he may be subrogated to the rights of the creditor under it, since his intention not to extinguish the judgment is manifested by the assignment.[6] But there are cases which deny the right of a surety to be subrogated to a judgment which he has paid for the principal, it being considered as extinguished by such payment, and this has been held in cases where the surety took an assignment of such judgment when paying it.[7]

36. **Right to be subrogated to securities held by the creditor.**—The surety entitled to subrogation is generally entitled to all the securities which the creditor may hold; this is said to be because it is an equitable right based on natural justice. "A note, bond, mortgage, pledge, and judgment are all equally securities for the debt and collateral to it. If the payment by the surety extinguished one of them, why does it not extinguish them all? The reasoning which makes a distinction is highly technical and certainly has no foundation in equity."[8] Payment by the surety operates as an equitable assignment from the creditor to him of all collateral securities and liens held by

[5] Neilson & Churchill v. Fry, 16 Ohio St. 553; Richter v. Cummings, 60 Pa. St. 441; Brandt, Suretyship and Guaranty (3rd ed.), §§ 342-344.

[6] Neal v. Nash, 23 Ohio St. 483; Thomson v. Palmer, 3 Rich. Eq. 139 (S. C.).

[7] Laval v. Rowley, 17 Ind. 36; Tiddy v. Harris, 101 N. C. 589; Chandler v. Higgins, 109 Ill. 602.

[8] Brandt, Suretyship and Guaranty (3rd ed.), § 346, citing Gerber v. Sharp, 72 Ind. 553.

the creditor. Equity thus establishes an apparent exception to the rule that payment discharges a debt as against the co-debtors in order to make subrogation possible and practicable. If the debt was held to be entirely discharged, all the collateral securities held by the creditor would be likewise discharged, and their assignment to the surety would be defeated.[9] So for the purpose of obtaining reimbursement from the principal, the surety after payment is regarded as at once subrogated to all the rights, remedies, and securities of the creditor and entitled to all his liens, priorities and means of payment against the principal.[10]

A party in indemnifying the surety and who has paid the debt for which the surety was bound is entitled to subrogation to the same extent as the surety would have been.[11]

37. **Surety for a surety.**—When the surety pays the debt he is subrogated to the creditor's right against the one primarily liable. A surety of a surety on paying the debt has this same right of subrogation against the debtor and he also has this right against the surety for which he is surety, for such a surety is, so far as the ultimate surety is concerned, a principal debtor. While this primary surety is liable to indemnify the ultimate surety, the ultimate surety does not have to contribute to the primary surety. The surety for the surety does not work out his right to subrogation against the principal debtor through the surety for which he is a surety. For example, if

[9] Edgerly v. Emerson, 23 N. H. 555.

[10] Brandt, Suretyship and Guaranty (3rd ed.), § 324.

[11] Rittenhouse v. Levering, 6 Watts & Serg. 190 (Pa.).

C is surety for B and B defaults in the payment of the obligation and C secures D to go on a note with him (C) as his surety to the creditor of B, which note is given in conditional payment of B's obligation to the creditor, D when he pays the note is subrogated to the position of the creditor as to his rights against B. If after D has paid the note B should pay C on C's representing to B that he (C) had paid the debt, D should not be precluded to recover from B. The deal between B and C should in no way affect D's right to subrogation through the creditor.[12]

38. **The right does not arise until the surety has paid in full or discharged the debt.**—In general, to be entitled to subrogation the surety must have paid the whole debt, and a part payment will not give him the benefit of subrogation.[13] Subrogation will not be allowed when it would be inequitable or to the prejudice of a creditor in reference to the debt for which the surety is liable.[14] For example, if a creditor holds securities for the payment of a $1,000 debt and the surety pays $500 on this debt, the surety's right to these securities is subsidiary to that of the creditor. The creditor and surety with respect to these securities stand in a position like that of a first and second encumbrancer. The creditor remains prior throughout until he gets payment. While the surety has no right to have an assignment of the securities or to take the securities until he has discharged the debt-

[12] Kolb v. The National Surety Co., 176 N. Y. 233 (1903). Contra: New York State Bank v. Fletcher, 5 Wend. 85 (N. Y.).

[13] Hollingsworth's Adm'r v. Floyd, 2 Har. & Gill. 87 (Md.).

[14] Crump v. McMurtry, 8 Mo. 408; Henley v. Stemmons, 4 B. Mon. 131 (Ky.).

or's obligation in full even before he has paid anything, the creditor's release of the securities would give the surety a defense to the extent of the securities released. The surety is really a second encumbrancer, entitled to follow the securities released into the hands of a volunteer or one who has purchased with notice of the surety's rights. After the creditor is paid he holds the securities in trust for the surety.

39. **Definition and nature of the right to exoneration.**—The right to exoneration is a right which the surety has, upon default of the principal debtor and before payment, to bring proceedings to compel the debtor to perform his obligation or his co-sureties to bear their proportion of the burden. This right to exoneration has not been well worked out in the cases or much discussed by text writers. The basis of the right to exoneration is apparently the hardship upon a surety to be compelled to pay the whole debt and have to resort to an action to recover indemnity or contribution from those who should either in the first place bear the entire burden or who should ultimately share their proportion of the burden with the plaintiff. In order to pay the debt which the creditor might easily collect from the solvent principal, the surety may have to sell his property at a forced sale, getting small value for it, or have it seized and sold on execution. The surety, being able to recover indemnity only for what he has actually paid out, has no adequate remedy at law. The equitable right to exoneration affords him adequate relief. If one of the ten sureties on a $10,000 bond had to pay the $10,000 and be left to his suit for indemnity against the prin-

cipal debtor, or by separate actions sue each of the sureties for a thousand dollars, it would perhaps impose the greatest hardship upon the surety. This right to exoneration, it is clear, cuts down the rights of the creditor to proceed in the first place against any one of the sureties and recover full payment, but in doing this the creditor's right is not diminished greatly and the surety is relieved from grave hardship.

When the debt is due the surety may bring the suit; he does not have to wait till he makes a payment or has a suit brought against him or a judgment obtained. The action is always in equity and the creditor, debtor if solvent, and co-sureties, if there are any and they are solvent, must be made parties.[15]

The court decrees that the debtor, if he is a party, shall pay the debt and thus relieve the surety from liability, or in case the debtor is insolvent that the co-sureties pay their contributive proportion of the debt and thus relieve the complainant surety of liability beyond the proportion of the debt he ought ultimately to bear.

40. **Examples of its application.**—One who has pledged property for the security of a debt may have exoneration to save his pledged property. If the principal and surety have property to secure them, the surety may have exoneration to relieve his property and throw the burden upon the property of the principal debtor.

An application of this right of exoneration is well illustrated by the case of Cosgrove v. McKassy.[16] Stat-

[15] Wolmerhausen v. Gullick (1893), 2 Ch. 514 (Eng.).
[16] 65 Minn. 426.

ing the case in simplified form, there were five co-sureties for an insolvent principal, and one surety, C, was indebted to the principal to an amount about equal to the principal obligation for which he was surety. After having paid more than his contributive share of the debt, C was sued by the principal debtor's assignee and he attempted to set-off in this action the amount he had paid the creditor for the principal debtor, but the court refused to permit him to set-off more than his contributive share—the amount he would ultimately have to have borne, or the amount he would have to bear under the exercise of his right to exoneration. To permit one of several sureties to set-off all they have paid the creditor for the principal debtor would leave wholly to the caprice of the creditor the question whether or not some or all of the sureties would escape liability in whole or in part. The extent of the general creditor's satisfaction against the principal debtor's estate would depend entirely upon which surety the creditor saw fit to obtain satisfaction from first.

41. **Distinguished from the surety's rights against the creditor.**—This right of the surety to exoneration must be distinguished from the right the surety has to compel the creditor to proceed against the principal debtor. It is well settled that a surety may after the debt becomes due and before he pays it by a suit in equity compel the creditor to collect the debt from the principal. In such case the surety must indemnify the creditor against loss. There are some cases which go so far as to hold that he may by request and without suit compel the creditor to

proceed against the debtor. In such case the request must be clear and distinct, but the great majority of the cases do not permit the surety to thus compel the creditor to sue the principal debtor in the absence of statutory provision.[17] This right of the surety to compel the creditor to sue the debtor is treated more fully under § 63 entitled "Failure to sue the debtor."

[17] Brandt, Suretyship and Guaranty (3rd ed.), §§ 261-265.

PART III

DEFENSES OF THE SURETY

CHAPTER IV.

PRINCIPAL NOT LIABLE ORIGINALLY.

42. **General statement.**—It is a general rule that the surety is not bound as a surety where the principal for some reason is not bound by the contract on which the surety has promised, since there is no primary liability to which the surety's promise can be collateral. This does not mean, however, that the one who purports to sign as surety entirely escapes liability. He may be liable, though not as a surety.

43. **Principal, a married woman.**—Thus, where a man promises to become surety for a married woman, if the promise is a guaranty, i. e., if the defendant says, "I will pay that which she is liable to pay," and does not, the defendant could not be held liable upon this promise, for there is no liability upon the principal debtor. The nullity of the principal obligation would in that case nullify the accessory one.

On the other hand, if the agreement, instead of being a guaranty, is a wider promise—a promise to pay if the principal does not—then the defendant is liable; in other words, the mere guarantor of a

married woman may set up the defense, when sued by the creditor, that his principal was a married woman and therefore not liable; but a surety who is not a guarantor cannot set up such defense. Whether the defendant's promise, in case the principal debtor is a married woman, is collateral in form, i. e., a guaranty, or is an absolute undertaking, is a difficult question and depends upon the circumstances of each particular case. If the promisee knows she is a married woman, the promise he wants from the defendant would not be that of a guaranty but one that would protect him because she, the principal debtor, is not liable. Of course if the promisee knew that the principal debtor was a married woman and knew that the defendant supposed her to be a widow, the defendant would have the defense of fraud. If both promisor and promisee are ignorant that the principal obligor is a married woman, the promisee should be able to hold the promisor on the contract, though not as a surety.[18]

44. **Principal, an infant.**—If the principal debtor is an infant, the promise of the defendant as surety for him is enforcible. The infant is competent to make a contract which is valid in every way except the infant has a personal right to disaffirm the contract. If he should see fit, after the contract has been executed, to disaffirm it and return the consideration he has received, the surety should have an equitable defense to the extent of the consideration returned.[19]

[18] Cases cited in Ames, Cases on Suretyship, p. 110; Kimball v. Newell, 7 Hill 116 (N. Y.), LEADING ILLUSTRATIVE CASES.

[19] Baker v. Kennett, 54 Mo. 82 (Disaffirmance by infant principal held a complete defense to an action by the creditor against the surety).

45. **Principal's name signed without authority.** —Where the defendant signs as a surety on a joint and several bond on which the principal obligor is not bound because his name was signed without authority, the surety will be held liable. The creditor in such case gets the legal obligation of the surety although the surety does not have the right to subrogation which he expected, he is not excused. The creditor is in no way at fault and the surety cannot set up an equitable defense when the creditor attempts to enforce his legal obligation.[20]

46. **Principal a corporation acting ultra vires.** —Where the principal obligee is a corporation and its contract is ultra vires so that it cannot be held on the undertaking, the surety, if not a guarantor, may be held liable but not as a surety. Where the obligee knows that the contract of the corporation is ultra vires, the promise that he will want from the surety is that of an absolute or an independent undertaking; i. e., that he will be liable whether the corporation is or is not. The non-liability of the principal in these cases is a fact, if known to the creditor, which must be taken into consideration in determining whether the surety's promise is collateral or independent in form.[21]

47. **Illegality affecting the principal's obligation.** —If the contract of the principal debtor is illegal and

[20] State v. Bowman, 10 Ohio 445; State v. Peyton, 32 Mo. App. 522; Cahill's Appeal, 48 Mich. 616; Trustees of Schools v. Sheik, 119 Ill. 579; McIntosh v. Hurst, 6 Mont. 287. Contrary to the text: Russell v. Annable, 109 Mass. 72; Dole Bros. Co. v. Cosmopolitan Preserving Co., 167 Mass. 481.

[21] Yorkshire Railway Wagon Co. v. Maclure, L. R., 19 Chancery Div. 478 (Eng.).

the obligee is ignorant of the illegality the surety is nevertheless liable.[22]

Where the debtor is guilty of illegality and the creditor is without notice the surety is liable; but where the parties are in *pari delicto* (equal fault) the creditor cannot recover.[23]

48. **Fraud affecting the principal's obligation.**— If the principal debtor's obligation is secured by the fraud of the creditor than the surety has an equitable defense. While the creditor in such case has the legal obligation of the surety, when he attempts to enforce it in a court of law against the surety he may be met by the equitable defense that he has destroyed the surety's right to subrogation. It is possible also that the surety in such case would have a legal defense on the ground of circuity of action. This could be worked out in this way. If the creditor is allowed to sue the surety, the surety having a right to indemnity could recover from the principal debtor who in turn would sue the creditor on the deceit. In order to prevent circuity of action, then, the surety might set up when sued the defense of fraud in bar of the creditor's action.

On the other hand if the creditor should get the surety's and the principal debtor's legal obligation without any fraud upon his part, but the principal debtor had secured the surety's signature by fraud, the surety would have no defense against the creditor, legal or equitable. The creditor has done

[22] Mann v. Eckford's Executors, 15 Wendell 502, 515 (N. Y.); Prather v. Smith, 101 Ga. 283, 287, 28 S. E. 857.

[23] Swift v. Beers, 3 Denio 70 (N. Y.).

nothing and it is not unconscionable in him to enforce his legal right against the surety.[24]

49. **Duress affecting the principal's obligation.** —A surety cannot avail himself of the defense of duress against the principal unless he was ignorant of the duress, so in setting up the defense of duress he must set up not only that the creditor was guilty of the duress upon the principal but that he, the surety, was ignorant of such duress at the time he entered into the contract of suretyship. Knowledge of the duress precludes the surety from setting it up as a defense.[25]

50. **Non-performance by obligee of his contract.** —It is an implied condition in the contract between the surety and the creditor that the creditor will substantially perform his contract with the debtor, for if the creditor does fail to perform his contract he thus destroys the surety's right to subrogation against the principal debtor. This will give the surety a defense. For example an accommodation indorser when sued by the payee upon the note may set up the defense that the payee had failed to perform his promise which was the consideration for the giving of the note.[26]

[24] Putnam v. Schuyler, 4 Hun 166 (N. Y.).
[25] Hazard v. Griswold, 21 Fed. 178; Griffith v. Sitgreaves, 90 Pa. 161.
[26] Sawyer v. Chambers, 43 Barb. 622 (N. Y.).

CHAPTER V.

PRINCIPAL'S OBLIGATION SUSPENDED OR EXTINGUISHED BY OPERATION OF LAW.

51. **War.**—Where war breaks out and the creditor and principal are residents of different countries and the creditor and surety are residents of the same country, the rule is that the obligation of the principal is suspended during the continuance of hostilities. The surety's right to subrogation has been injured but it was not caused by the intermeddling of the creditor, and the creditor will be allowed to enforce his legal obligation against the surety as there is no equitable defense which the surety can set up to charge the creditor's conscience.[27]

52. **Bankruptcy.**—A discharge of the principal debtor in bankruptcy does not discharge the surety. Such discharge of the principal debtor is not worked by the voluntary act of the creditor but by operation of law. Of course if the creditor voluntarily discharge the principal debtor the surety would have an equitable defense against the creditor.[28]

53. **Statute of Limitations.**—It is possible for the Statute of Limitations to run in favor of the principal debtor and not in favor of the surety. If the Statute of Limitations has run in favor of the principal debtor the surety will be deprived of his right to subrogation

[27] Paul v. Christie, 4 Harris & McHenry 161 (Md.).
[28] Guild v. Butler, 122 Mass. 498.

against the principal debtor, but this injury to the surety's right is one that is inflicted by the law and not by the creditor, so the surety has no equitable defense against the creditor. The creditor is under no affirmative duty to proceed against the principal debtor before the Statute of Limitations has run. The surety has a right to request that the creditor take no affirmative act which will operate to his prejudice, but mere delay on the part of the creditor is no breach of duty to the surety.[29]

54. **Death of the principal.**—Where one or two or more joint obligors die the creditor has no direct right against the deceased obligor's estate. He must pursue the survivor. So where a principal and surety are jointly bound to the creditor, though one designates himself as principal and the other as surety and the principal dies, the obligation survives against the surety. The surety claims that he has been deprived of the right of subrogation which he had expected, but it is no fault of the creditor and he may hold the surety. If the surety pays he will have a right of action against the deceased principal's estate upon the basis that he has laid out money for the debtor. If the surety is insolvent and the estate of the deceased is solvent, the creditor may work out a right in equity against the deceased principal's estate through the surety's right to exoneration, a right which the surety has to be saved harmless by performance of the obligation by his principal debtor. By this method the creditor could by equitable execution get one hundred cents on the dollar while the

[29] Villars v. Palmer, 67 Ill. 204.

other creditors of the surety would get less; i. e., only what the surety's estate would pay.

The creditor though without remedy at law can in equity recover against the estate of the deceased principal joint obligor. If the obligation of the debtor and surety instead of being joint is joint and several or several, the rule of survivorship does not prevail and the deceased obligor's estate is bound at law as well as the survivors. The death of the principal debtor in such case then has no effect on the surety's obligation and the creditor can hold him liable. It is well to observe in this connection that statutes are common making joint obligations joint and several; in states having such statutes the rule of survivorship does not exist and the death of the debtor in no way affects the right of the creditor to recover against the surety.[30]

55. **Judgment in favor of the principal.**—Where the creditor brings action against the principal debtor and judgment goes against the creditor, the surety may set up the judgment thus obtained against the creditor when later sued by the creditor. This would not apply in cases where the judgment went against the creditor on the ground that the Statute of Limitations had run in favor of the principal debtor, or the principal debtor had the defense of infancy, bankruptcy or ultra vires contract. The reason such judgments in favor of the debtor cannot be used by the surety is that they rest upon defenses of the principal debtor that in no way affect the legal obligation of the

[30] Richardson v. Horton, 6 Beav. 185 (Eng.); foot-note, Ames, Cases on Suretyship, p. 138.

surety and they are not defenses that can be charged against the creditor's conscience. On the other hand, the judgment which the creditor obtains against the principal debtor is not conclusive evidence of the validity of the creditor's claim against the surety. It, however, is admissible as prima facie evidence of the validity of the creditor's claim.[31]

[31] Ames, Cases on Suretyship, p. 142, note.

CHAPTER VI.

PRINCIPAL'S OBLIGATION DISCHARGED OR MODIFIED BY ACT OF THE CREDITOR.

56. **Payment.**—Where the principal debtor has paid the creditor, the liability of the surety or guarantor ceases.[32] Payment in such cases is an obvious defense available to the surety, but where payment is made by the principal debtor and accepted by the creditor and afterwards without fault of the creditor is set aside as a fraudulent preference made on the eve of insolvency, the surety will have no defense.[33] When the debt is once paid it cannot be revived by an agreement between principal and creditor otherwise applying the sum, so as to bind the surety.[34] And if funds have been appropriated by the principal to the payment of the debt, they cannot be diverted to the payment of any other debt of the principal without the consent of the surety.[35]

The surety is discharged by payment on behalf of the principal, regardless of the source of the money, and another advancing it to the principal cannot hold the surety.[36]

A valid tender of the money due on the debt by the principal, after the debt is due, if not accepted by

[32] Petefish v. Watkins, 124 Ill. 384.

[33] Petty v. Cooke, L. R. 6 Q. B. 790 (Eng.); Watson v. Poague, 42 Iowa 582.

[34] Gibson v. Rix, 32 Vt. 824.

[35] Mellendy v. Austin, 69 Ill. 15.

[36] Felch v. Lee, 15 Wis. 265.

the creditor, will discharge the surety. Otherwise, the courts say, the creditor would have the power to keep the surety under the cloud of the debt any length of time.[37]

So where the creditor accepts part payment from the principal in full satisfaction of the debt the surety is discharged.[38]

57. **Release.**—A release of one of several joint debtors or a release of one of several joint and several debtors discharges the other obligors at common law.[39]

So where a surety is bound jointly with the principal debtor or jointly and severally, a release of the principal debtor by the creditor would at law discharge the surety. This discharge of the surety is not based upon the existence of an equitable principle that the creditor by his wrong-doing has destroyed some of the rights of the surety although facts exist in such case which would be sufficient basis for such an equitable defense. The real nature of the defense in the case of a release of a surety bound jointly or jointly and severally with the debtor is this well established common law rule, whatever may have been its basis.

Where the principal debtor and the surety are bound severally but not bound jointly or jointly and severally, and the creditor releases the principal debtor, such release does not affect the legal obligation of the surety. The surety, however, has an

[37] Johnson v. Ivey, 4 Cold. 608 (Tenn.); Spurgeon v. Smitha, 114 Ind. 453.
[38] Heitz v. Atlee, 67 Iowa 483.
[39] Williston, 25 Harvard Law Review 206.

equitable defense because it is unconscionable for the creditor to release the debtor and hold the surety. By releasing the debtor he destroys the surety's right to subrogation. The destruction of the surety's right to subrogation alone is sufficient basis for this equitable defense. The creditor is not permitted to argue that the surety has left to him unimpaired his right to reimbursement against the principal debtor should he, the surety, pay the debt. The creditor has by his own wilful intermeddling destroyed this one right of the surety, i. e., the right to subrogation, and he has thereby increased the surety's risk. There is another ground upon which this defense of the surety that the creditor has released the principal debtor may rest. It is that of circuity of action. If the creditor is allowed to sue the surety, the surety will in turn get reimbursement from the debtor and the debtor then can recover from the creditor for breaking his contract of release. To prevent this circuity of action the debtor might enjoin the creditor's suit against the surety at the outset. Instead of compelling the debtor to resort to an injunction the matter may be worked out more simply by permitting the surety at the outset to set up as a defense the creditor's release of the debtor.[40]

58. **Covenant not to sue.**—A covenant by the creditor not to sue the principal debtor discharges the sureties absolutely. At law a covenant not to sue one of several sureties has the same effect upon the remaining obligors as if the obligation were joint or joint and several. Such a covenant would not

[40] Williston, 25 Harvard Law Review 208.

affect a discharge of the other obligors at law. The surety's defense in such cases where the creditor covenants not to sue the principal debtor, is not legal, but equitable. At common law a covenant by a creditor not to sue his debtor would discharge the debtor from further liability. If the creditor sued the debtor the debtor could set up the covenant as a bar to the original cause of action. The debtor was allowed to use this defense to avoid circuity of action. If the creditor recovered the debtor could recover back precisely the same damages for breach of the covenant not to sue, and to simplify the matter, the debtor was permitted to set up the covenant not to sue as a defense to the action of the creditor. But where there is covenant not to sue one of several joint obligors, the covenantee could not enjoin suit against himself and his joint obligors because that would not carry out the intention of the parties. The intention of the parties could be carried out only by permitting the obligee to sue the joint debtors and in turn to permit the convenantee to recover from the creditor for breach of the covenant not to sue. The measure of damages for breach of the covenant would depend upon what extent the creditor's judgment had been satisfied out of the covenantee's property.[41]

It will be seen, then, that the creditor, although he has covenanted not to sue the principal debtor (regardless of whether the surety is bound jointly, jointly and severally, or severally, with the principal debtor), may sue the debtor. The question then arises, how can this covenant not to sue the principal debtor

[41] Williston, 25 Harvard Law Review 210, 211.

in any way injure the surety? The surety's right to indemnity is not affected. That cannot be taken away from him without his consent and if he should pay the debt there is no question but what he could recover indemnity from the debtor. If the creditor may sue the debtor in spite of his covenant not to sue him, how has the surety's right to subrogation been injured by such covenant? The answer to this question is found in this: Although the creditor may sue the debtor notwithstanding his covenant, the fact that the creditor has bound himself by a valid contract not to sue the debtor, injuriously affects the surety's right to subrogation. Besides an injury to the surety's right to subrogation, the covenant not to sue requires the surety to face a different chance after the agreement than before.[42] The hands of the creditor are tied, for if he breaks the covenant he may be sued for damages. The surety's right to subrogation in such case rests upon the presumed wrong of the creditor.[43]

59. **Covenant not to sue, with reservations.**— A covenant by the creditor not to sue the principal debtor if he reserves the right against the sureties will not give the sureties a defense. This is well established law.[44] This, however, is inconsistent with the rule of law that a binding agreement by the principal to extend time of payment by the debtor discharges the surety. There is no question but what there is the same basis in equity for discharging the surety in the case of a covenant not to sue with reservations against

[42] Williston, 25 Harvard Law Review 213.
[43] Brandt, Suretyship and Guaranty (3rd ed.), § 382.
[44] See 25 Harvard Law Review, p. 212, foot-note 38.

the surety as there is in the case of an extension of time. In each of the cases the surety's right to subrogation is injuriously affected and he is called upon to face a different risk after the covenant than before.[45]

The explanation of the existence side by side of these inconsistent rules is historical. Though it is not possible to reconcile according to principle the general rule forbidding the giving of time with the special rule permitting it without the surety's consent if the creditor's right against the surety is expressly reserved, it is possible at least to show how the inconsistency arose. The general rule forbidding the giving of time is a modern one in equity. "Its recognition at law is still more modern. About a century before such a doctrine was heard of even in equity, it had been laid down that a covenant not to sue one joint debtor did not discharge the others. Before the adoption by courts of law of the rule protecting sureties from agreements between creditor and principal debtor for forbearance, a case had presented the question of the effect of a release of one joint debtor with a reservation of rights against another. The court purported merely to construe a release in terms contradictory and held it to amount in effect to a covenant not to sue one joint debtor, and therefore, under well recognized law, to have no effect on the liability of his co-debtor. The doctrine of this case persisted and was even applied to cases where the joint debtor against whom rights were reserved was a surety, while side by side with this doctrine there flourished the newly arisen doctrine discharging sureties if time

[45] 25 Harvard Law Review 213.

was given to the principal debtor. Lord Eldon was thought to recognize the right of the creditor in equity to reserve his rights against the surety. Baron Parke added the weight of his authority, and the matter must now be considered settled, however unsatisfactory may be the attempts to reconcile two conflicting doctrines."[46]

60. **Extension of time.**—The surety or guarantor obligated to pay the debt of another will be discharged if the creditor, without the consent of the surety or guarantor, by an agreement upon sufficient consideration with the principal, extend the time of payment or performance for a definite time; and this whether the extension is given before or after the debt is due, or after judgment taken upon it. The ground upon which the defense of the surety rests is not that so frequently stated, an alteration of the surety's contract, for the surety's contract is not altered. The basis of the defense is that the surety's risk is varied by the extension of time given the principal debtor. It is entirely a different undertaking to answer for a principal who is to pay in six months than to answer for a principal who is to pay in ten months. The surety's right to subrogation has been prejudiced as explained under §§ 57, 58 and 59 of the text and the surety's risk varied.

The consideration. The agreement for an extension of time between principal and creditor to operate as a discharge must be founded upon a sufficient consideration the same as any simple contract. Without a consideration the contract is not binding and the

[46] 25 Harvard Law Review 211-212.

surety's right by subrogation to proceed against the principal is not prejudiced.[47] A mere voluntary or passive delay by the creditor, however long continued, will not release the surety.[48] And it is held that the payment of interest when due, or part payment of the debt when due, will not be a sufficient consideration to support the contract for an extension of time, as such payments are due to the creditor anyway.[49] But the payment of interest in advance, or the payment of any part of the debt before due, will be a sufficient consideration, as this is an advantage to the creditor.[50] And in the case of interest being paid in advance it is held in many cases that such payment operates as a prima facie agreement to extend the time of payment of the debt for a period for which interest was paid, without further evidence.[51] The agreement to pay interest for the period of the extension is sometimes held to be a sufficient consideration, though at no higher rate than the obligation previously drew,[52] it being considered a valuable right to have money placed at interest. The payment of an increased rate of interest is certainly sufficient.[53] The *payment* of usurious interest is held to be a sufficient consideration for an extension.[54] But the *agreement* to pay usurious interest is not sufficient, since it is

[47] Ford v. Beard, 31 Mo. 459; Zane v. Kennedy, 73 Pa. St. 182.

[48] Whiting v. Clark, 17 Cal. 407.

[49] Roberts v. Stewart, 31 Miss. 664; Johnston v. Thompson, 4 Watts 446 (Pa.).

[50] Uhler v. Applegate, 26 Pa. St. 140; Maher v. Lanfrom, 86 Ill. 513.

[51] Woodburn v. Carter, 50 Ind. 376; Crosby v. Wyatt, 10 N. H. 318. Contra, Hosea v. Rowley, 57 Mo. 357.

[52] McComb v. Kittridge, 14 Ohio 348.

[53] Huff v. Cole, 45 Ind. 300.

[54] Turrill v. Boynton, 23 Vt. 142.

void.[55] And where the statute of the state declared all contracts infected with usury void, the actual payment of usury was held not to be sufficient consideration to support an agreement for an extension of time so as to discharge the surety.[56]

For a definite time. The extension of time must be definite, otherwise the hands of the creditor are not tied, the contract being void for uncertainty. When the extension relied on was to wait "a while longer," it was held void for uncertainty and the surety not released.[57] But an extension of time "to the summer" or "to the fall" was held sufficiently certain and definite.[58] But an extension of the time of payment until "some time in the summer" was held too indefinite.[59] The surety may consent to an extension of the time of payment, and in such case will not be discharged.[60] And the surety after having been discharged by the giving of time to the principal, may bind himself by a new promise to pay the debt. If he knows the facts of his discharge by the giving of time no new consideration need appear for the promise, but it must be upon consideration if he does not know of his discharge.[61]

To the rule that the surety will be discharged by giving time to the principal several exceptions exist: Thus where the surety is fully indemnified by prop-

[55] Hunt v. Postlewait, 28 Iowa 427.

[56] Vilas & Bacon v. Jones & Piercy, 1 N. Y. 274; Irvine v. Adams, 48 Wis. 468.

[57] Jenkins v. Clarkson, 7 Ohio 72.

[58] Abel v. Alexander, 45 Ind. 523.

[59] Miller v. Stem, 2 Pa. St. 286.

[60] Treat v. Smith, 54 Me. 112.

[61] New Hampshire Bank v. Colcord, 15 N. H. 119; Williams v. Boyd, 75 Ind. 286; Bramble v. Ward, 40 Ohio St. 267.

erty of the principal put under his control to meet his obligation, such surety will not be discharged by an extension of time granted to the principal by the creditor.[62] The surety is regarded as the principal, or as holding property appropriated to the payment of the debt of the principal.[63] So the giving of time to the surety by an agreement between creditor and principal, as by the creditor agreeing that he shall not be sued for a stated time after the debt is due, does not affect the liabilities of the surety or principal.[64] But if time is given to one of two equal cosureties the other will be discharged from one-half the debt.[65] The agreement to give time may be express or implied if carried out according to its terms.[66]

The surety is discharged though the agreement for an extension of time is not made until after the debt is due[67] or after judgment taken.[68]

The taking of a new note from the principal by the creditor, which note falls due on a later date than the original obligation signed by the surety, will discharge the surety, as it amounts to an extension of time.[69] But it is otherwise where the new note falls due before the original.[70] The taking of collateral security, as a true deed or mortgage security, will not, in general, discharge the surety, though it matures

[62] Kleinhaus v. Generous, 25 Ohio St. 667.
[63] Smith v. Steele's Estate, 25 Vt. 427.
[64] Emery v. Richardson, 61 Me. 99.
[65] Gosserand v. Lacour, 8 La. Ann. 75.
[66] Osborn v. Low, 40 Ohio St. 347.
[67] Wheaton v. Wheeler, 27 Minn. 464.
[68] Pilgrim v. Dykes, 24 Tex. 383.
[69] Chickasaw County v. Pitcher, 36 Iowa 593.
[70] Robinson v. Dale, 38 Wis. 330.

after the time of payment of the debt, if it does not amount to an extension of the time of payment.[71] But this rule is only prima facie and gives place to an express agreement for an extension of time on taking such security. The agreement for extension of time in order to work a discharge of the surety must be made by the creditor or his lawfully authorized agent. And where the creditor reserves remedies against the surety in giving time to the principal, the surety is not discharged.[72]

Where time is extended to one not known to be a surety. Where the obligee knows at the time the obligation is entered into that one of the parties contracts as a surety, the law is well settled that if the creditor gives time to the principal debtor the surety has a defense. Where the suretyship relation arises after the parties have contracted by reason of some subsequent agreement among the obligors, an extension of time to one of the obligors by the obligee does not give the surety a defense. The surety's right to subrogation has been prejudiced, but the creditor has done nothing unconscionable. If, however, the creditor knows the obligors have shifted their positions from that of principal obligors to principal obligor and surety, he cannot then extend time to the principal without giving the surety a defense. It is unconscionable in the obligee to thus vary the surety's risk.

Thus where a partnership owes debts and one of the partners retires on the other partners assuming with him the firm debts, a suretyship relation is created, the

[71] Burke v. Cruger, 8 Tex. 66; German Savings Institution v. Vahle, 28 Ill. App. 557.

[72] Morse v. Huntington, 40 Vt. 488.

retiring partner becoming a surety and the continuing members principals. A creditor who knows of this change in the partnership will by extending time to the firm release the retiring partner.[73]

61. **Surrender or loss of securities.**—It is an equitable principle arising from the relation of principal and surety, that the property of the principal pledged for the payment of his debt, should be applied to the payment of such debt so as to relieve the surety from liability, and the creditor having property pledged to him by the principal for this purpose by relinquishing his lien upon the pledged property so that it cannot be applied to the payment of the debt discharges the surety.[74] The reason the surety is given a defense is because it is a variation of his risk. The right to indemnity, contribution, and exoneration may not be affected by the release of the securities, but his right to subrogation is materially cut down. Through this right he could have realized upon the securities which the creditor has released. The surety's defense, however, does not extend beyond the value of the securities surrendered by the creditor. It is thought that the utmost possible variation of his risk is the value of such securities. It is the value of the securities at the time of their surrender that is taken as the measure of the surety's defense. The creditor holding a lien or pledge of property of the principal is regarded as a trustee of the property, to be applied according to the purpose of the trust,

[73] Rouse v. Bradford Banking Co. (1894), Appeal Cases 586 (Eng.).

[74] Port v. Robbins, 35 Iowa 208; Dodd v. Winn, 27 Mo. 501, LEADING ILLUSTRATIVE CASES.

and this is true even when the lien is secured after the surety has become bound. And since the surety by paying the debt is subrogated to all the securities which the creditor has at the time of payment of the debt, the release of any part of such security by the creditor is such a damage to the surety as will work a discharge *pro tanto* (for so much) of his obligation.[75] The surety may agree to, or request, the release and will then be bound; but he is not obliged to object to the release by the creditor if he has knowledge of such party's intention in order to have a defense.[76]

The creditor by wasting or rendering unavailable the mortgage security of the principal will thereby discharge the surety.[77] If the creditor by relinquishing security for the debt materially alters the contract of the surety, such surety is fully discharged.[78] If the surety's contract is not changed, he is only released to the extent of the security released.[79] It is not every release of the securities held by the creditor that will give the surety a defense; for example, if a creditor has a lien upon real estate and releases the lien as to a part of it to make title to one who has purchased it for its full value, the purchaser to apply the purchase money in extinguishment of a mortgage which is prior to a lien on the property, such release

[75] Guild v. Butler, 127 Mass. 386; Cummings v. Little, 45 Me. 183.

[76] Brown v. Abbott, 110 Ill. 162; Polak v. Everett, L. R. 1 Q. B. Div. 669 (Eng.).

[77] Phares v. Barbour, 49 Ill. 370.

[78] Polak v. Everett, supra; Watts v. Shuttleworth, 7 H. & N. 353 (Eng.), LEADING ILLUSTRATIVE CASES.

[79] McMullen v. Hinkle, 39 Miss. 142; Brandt, Suretyship and Guaranty (3rd ed.), §§ 483-484.

and application of the purchase money will not give the surety a defense.[80] Again, the creditor may exchange the securities for securities that are better or are equally good.[81]

The creditor must have a lien on the property released or such an interest in it as will charge him as trustee, if the release is to operate as a discharge of the surety. Where the release of the property by the creditor in no wise varies the risk of the surety it will not discharge the surety.[82] If the property released is worthless the surety has no defense. If the creditor has a second mortgage and the property has so depreciated in value that the security of the second mortgage is valueless, the creditor may release the security without giving the surety a defense.[83] A release of the security by the creditor is prima facie a complete variation of the surety's risk. The creditor may show that the release of the securities did not constitute a complete variation of the surety's risk. In other words, the creditor, when the surety sets up the defense of release of securities, may reduce the extent of that defense by showing that the property released was worthless, of little value, or of less value than the face of the obligation secured.

The release by the creditor of a valid levy, or execution, against the property of the principal, by which the surety loses the right to hold the property for the payment of the debt, will discharge the surety to the

[80] Neff's Appeal, 9 Watts & Serg. 36 (Pa.).

[81] Ames, Cases on Suretyship, p. 184, foot-note.

[82] Brandt, Suretyship and Guaranty (3rd ed.), § 486; Coates v. Coates, 33 Beav. 249 (Eng.).

[83] Dunn v. Parsons, 40 Hun 77 (N. Y.).

extent of the value of the property levied upon.[84] Likewise the release by the creditor of an attachment on property of the principal to the damage of the surety will discharge the surety *pro tanto,* as such attachment is regarded as a lien held by the creditor and must be protected for the benefit of the surety.[85] The mere dismissal of a suit by the creditor against the principal in which no attachment or other lien has been secured will not discharge the surety.[86]

The creditor being held to be a trustee of the property of the principal in his hands for the benefit of the surety, his negligence or carelessness as regards such property resulting in a loss will discharge the surety to the extent of the depreciation in the security. The creditor in such cases must use due diligence in preserving such property according to the circumstances of the case. As regards collateral security in the way of claims or obligations against third parties, the creditor is bound to use such diligence and take such steps as will render them available for the purpose for which they were assigned, and negligence or inaction resulting in a loss will release the surety.[87] Thus where the assignee of a note as collateral security was notified of the impending insolvency of the maker, and warned to sue or surrender the note, and he did not do so, the debt being lost, he was held responsible for the amount of the note.[88] And where the creditor had received a mortgage on

[84] Dixon v. Ewing's Admr., 3 Ohio 280.
[85] City of Maquoketa v. Willey, 35 Iowa 323.
[86] Somerville v. Marbury's Adm'r, 7 Gill & Johns. 275 (Md.).
[87] Crim v. Fleming, 101 Ind. 154; Kemmerer v. Wilson, 31 Pa. St. 110.
[88] Bonta v. Curry, 3 Bush 678 (Ky.).

personal property from the principal to secure a note previously signed by a surety, and negligently let the principal dispose of such mortgaged property, he thereby discharged the surety.[89] So the creditor who has a lien or security for a debt will discharge the surety by not taking the steps necessary to preserve or perfect such lien on the principal's property, as by neglecting to make the proper parties defendant in case of the death of the principal,[90] or to record a mortgage,[91] or to notify an indorser of the note from whom the surety would be entitled to indemnity of the dishonor.[92] If a creditor holds collateral security and negligently fails to collect it the surety is discharged to the extent of the loss due to the creditor's negligence.[93]

62. **Failure to use money in payment of his claim.** —Where the creditor refuses to receive payment when tendered by the principal debtor, the surety is released.[94] The surety is likewise discharged if his own tender of payment is refused by the creditor.[95] Where the creditor is a bank it is under no obligation to the surety to apply the debtor's deposits with the bank to the payment of the principal debt. This is clearly true where the deposit is made after the debt becomes due. If the principal, however, makes a note payable at his bank where he has deposits sufficient to meet the note when it matures, an indorser or other

[89] City Bank v. Young, 43 N. H. 457.
[90] Saulet v. Trepagnier, 2 La. Ann. 427.
[91] Burr v. Boyer, 2 Neb. 265; Arthur v. Brown, 74 S. E. 652 (S. C. 1912).
[92] City Bank v. Young, 43 N. H. 457.
[93] Fennell v. McGowan, 58 Miss. 261.
[94] Ames, Cases on Suretyship, p. 219, foot-note.
[95] Same as note 94.

surety on the note will be discharged if the bank does not honor the note.[96]

63. **Failure to sue the debtor.**—In the case of Pain v. Packard,[97] the New York Supreme Court held that a surety was discharged from obligation to the creditor where he had requested the creditor to collect the debt from the principal debtor and the creditor had failed to do it. A few states still follow Pain v. Packard, but most of the states have repudiated this doctrine and it persists today, where it exists at all, almost altogether by virtue of statutory provisions.[98] If the surety brings a bill against the creditor and tenders full indemnity he may by such means compel the creditor to sue the principal. The equitable foundation of such a suit rests upon the obligation of the debtor to exonerate him. The nature of the action, however, differs considerably from a bill for exoneration. In the bill for exoneration the surety seeks to compel the debtor to perform his obligation to the creditor, while in this bill the surety seeks to compel the creditor to come against the debtor who should bear the burden instead of him.

64. **Failure to notify the guarantor of acceptance.**—In dealing with this topic it is necessary to keep in mind that there is a distinction between sureties and guarantors. A surety, using the word as distinguished from guarantor, is not entitled to notice of acceptance of the guaranty by the creditor, while a guarantor is in many cases entitled to notice of

[96] Ames, Cases on Suretyship, p. 220, note.
[97] 13 Johns. 174 (N. Y.), LEADING ILLUSTRATIVE CASES.
[98] Ames, Cases on Suretyship, pp. 222-223, notes.

acceptance.[99] Where the guaranty is a guaranty of an existing debt or a liability arising the moment the guaranty is given, or where the guaranty is given for consideration of $1, or where the promise of guaranty is one of the promises of a bi-lateral contract, i. e., where a promise to guarantee is given in return for a promise to extend credit, the majority of courts hold that it is not necessary for the creditor to give notice to the guarantor of his acceptance of the guaranty.[1] On the other hand, where there is a mere offer to guaranty or where it is left entirely to the option of the party to whom application for credit is made as to whether he will accept the guaranty, notice of acceptance by the creditor must be given to the guarantor in order to hold him liable. Where there is a general letter of credit or where a letter of credit is given to the proposed debtor, addressed to a particular person, it is necessary for the creditor to give notice to the guarantor of his acceptance of the guaranty.

There seems to be considerable confusion in the courts as to the ground upon which the necessity for notice rests. Some courts have placed it upon the ground that notice is necessary to complete the contract obligation of the guarantor, and others have based it upon an equitable ground that it is unfair to the guarantor not to give him notice of the acceptance of the guaranty within a reasonable time. Those courts which take the view that notice of acceptance

[99] 16 L. R. A. (N. S.) 365, foot-note.

[1] Davis v. Wells, Fargo & Co., 104 U. S. 159, LEADING ILLUSTRATIVE CASES; Ames, Cases on Suretyship, pp. 232-233, foot-notes.

is necessary to complete the contract of guaranty hold that where there exists a binding contract upon the creditor before credit is extended to the debtor, no notice is necessary, but where the extension of credit is made without a previous obligation on the part of the creditor to make it, notice of acceptance is necessary. In the case of Davis et al. v. Wells Fargo,[2] the defendant, for a consideration of $1, agreed to become guarantor for Gordon & Co. to the plaintiffs to the extent of $10,000, the guaranty to continue open until revoked in writing. The court held that notice to the guarantor was not necessary because there was a binding contract upon the creditor even before credit was extended. They distinguished the case from a proposal to guarantee the debtor's obligation for advances made by the creditor from time to time where the creditor was not previous to the advance under obligation to make advances, the court were of the opinion that notice of the advance was an act necessary to complete the contract. This can hardly be supported on principle. The advance constitutes an acceptance of the offer of guaranty without notice; in other words, a uni-lateral contract comes into existence then instead of a bi-lateral one, and it would seem that the contract exists even before notice of acceptance of the offer is communicated to the guarantor. If an advance should be made by a creditor under such an arrangement and a few minutes later the guarantor died, and shortly after the guarantor's death the creditor should mail a notice to him, it can hardly be questioned but that the guarantor's estate

[2] 104 U. S. 159.

would be liable. The contract is complete when the advance is made, if not before, and if notice is required in such case it can only rest upon the ground that the creditor owes a duty to the guarantor to notify him of his acceptance of the guaranty because of the possible hardship upon the guarantor not to have notice, and because it is only a slight duty imposed upon the creditor.

65. **Failure to notify the guarantor of default.** —Where the guaranty is for a definite payment or performance at a definite time, the guarantor is not entitled to have notice from the creditor of the default of the debtor. On the other hand, if the guaranty is for an indefinite amount, or payable at indefinite times, the guarantor is entitled to have notice of the default of the debtor.[3] The holder of a note must give notice to the indorser of the default of the maker, but he is not obliged to notify a mere guarantor. If the guarantor on a note should be deprived of his right to recover reimbursement from an indorser on that note because of failure of the creditor to give the indorser notice of default of the maker, the guarantor will have a good defense when sued by the creditor upon his contract of guaranty.[4]

Where the principal is insolvent when the debt becomes due no notice of his default need be given the guarantor.[5] So, where the guarantor's promise is unconditional, and made after the debt was due from the principal, no notice of demand on principal

[3] Ames, Cases on Suretyship, pp. 238-239, foot-notes.
[4] Hungerford v. O'Brien, 37 Minn. 306.
[5] Wolfe v. Brown, 5 Ohio St. 304.

and default need be given to hold the guarantor.[6] The guarantor may waive demand and notice of default, and a subsequent promise to pay the debt made by the guarantor will be treated as a waiver of demand and notice.[7] But where the advances are made to the principal on a letter of credit given by the guarantor, by weight of authority, demand of payment must be made on the principal, and notice of default given to the guarantor, unless the principal be insolvent at the date of maturity.[8]

Notice of default, when necessary to be given, should be given within a reasonable time, and this depends upon the circumstances of each case. The question what constitutes reasonable time would be a question for the jury under instruction from the court.[9] Proof that notice was given may be inferred from circumstances, and any notice coming to the guarantor, whether from the creditor or not, will be sufficient to charge him. The notice need not be in writing or in any particular form, unless specified in the contract.[10]

66. **Alteration of principal's contract or variation of the surety's risk.**—The surety may escape liability to the creditor either by alteration of his contract or by variation of his risk. If the surety depends upon variation of the risk for his defense it must be a case in which he is prejudiced. But where he

[6] Munro v. Hill, 25 S. C. 476; Read v. Cutts, 7 Greenl. 186 (Me.).

[7] Wadsworth v. Allen, 8 Gratt. 174 (Va.); Reynolds v. Douglass, 12 Pet. 497 (U. S.).

[8] Douglass v. Reynolds, 7 Pet. 113 (U. S.).

[9] Lowry v. Adams, 22 Vt. 160.

[10] Lee v. Briggs, 39 Mich. 592; Brandt, Suretyship and Guaranty (3rd ed.), § 225.

depends upon an alteration of the contract for his defense it is not necessary to find that the surety is prejudiced by the change which has been made. The variation of risk is an affirmative defense, while that of alteration of the contract is negative. The defense of the alteration of the principal's contract is based upon the well established doctrine that a material alteration of an executed instrument discharges the obligors upon that instrument. If the instrument is altered without the surety's assent before delivery but after the surety signs, he cannot be held liable. The reason for this is that there has been no meeting of minds. The creditor has received no obligation to which the surety assented.[11] If the instrument is altered after it has been delivered to the creditor it is a general rule that the surety cannot be held on such altered instrument. If alteration is immaterial or if the surety waives the defense of alteration the surety will be bound. If the instrument is altered by a stranger or by accident after it has been effectively delivered to the creditor, the surety will not be released by such change in the contract, but the creditor will be able to hold him upon the instrument as it was before it was altered. It is also generally held in this country that in case of an innocent alteration by the holder of the note, that is, if the alteration is made without a fraudulent intent, the creditor may recover upon the instrument as if it were unaltered.[12]

A material alteration is one that changes the

[11] Wood v. Steele, 6 Wall. 80 (U. S.).

[12] See 1 Ames, Cases on Bills and Notes, p. 449, note; Ames, Cases on Suretyship, p. 246, note.

instrument so as to give the language a different meaning in its legal effect from that which it originally had, one which changes the legal identity of the instrument or the terms or relations of the parties to it.[13] Thus, the changing of a date of a note by the holder without the consent of a surety will discharge the surety.[14] So where the creditor adds "with interest from date," to a note written without interest when signed by the surety, the latter is discharged.[15] The addition of a new party to a note after the execution and delivery by the surety, without his consent, though a benefit to such surety, will discharge him.[16]

A change made by a collateral agreement, if it does not amount to an alteration of the contract, must vary the risk of the surety in order to discharge him. For example in Cambridge Savings Bank v. Hyde,[17] the face of the note provided for the payment of 7½ per cent. interest on demand. Afterwards the holder and the maker of the note, without the assent of the surety, by writing on the back of the instrument, provided that the interest should be 6½ per cent. instead of 7½ per cent. The court held that the surety was not discharged. If this had constituted an alteration of the contract the surety would be discharged regardless of any question of whether he was prejudiced by the change thus made; but it was not an alteration of the contract, but a collateral change. If the holder and maker of the note, instead of writing upon the back

[13] 2 Cyclopaedia of Law and Procedure 177.
[14] Miller v. Gilleland, 19 Pa. St. 119.
[15] Kountz v. Hart, 17 Ind. 329.
[16] Bank v. Penick, 2 T. B. Monr. 98 (Ky.).
[17] 131 Mass. 77, LEADING ILLUSTRATIVE CASES.

of the note, had erased the 7½ per cent. on the face of the note and written in 6½ per cent., it would have been an alteration of the note which would have discharged the surety. The collateral arrangement in the principal case affects only one of the terms of the contract. It is not an entire substitution of a new contract for the old. The variation of the surety's risk by this collateral arrangement is one of reduction and cannot by any possibility be interpreted as increasing the risk of the surety. If the collateral arrangement had been to change the 7½ per cent. to 8½ per cent., the increase of the surety's risk would have been sufficient to give him a complete defense. It is much more likely that a debtor can pay 7½ per cent. interest than 8½ per cent. This possible difference in the inability of the debtor to pay goes to the whole of the obligation and would give the surety a complete defense.

The case of variation of risk by collateral agreement must be distinguished from a variation of risk where the arrangement is one of substitution of a new contract for the old. In the case of a substitution of the new contract for the old it is immaterial whether the surety's risk has been varied, for the surety has a right to say when he is sued on the old contract, that it has been discharged and that he never became a surety upon the new contract. Cambridge Savings Bank v. Hyde is a good example of a collateral arrangement not constituting a substitution. If the alterations of the collateral arrangement are very extensive or go much beyond that in Cambridge Savings Bank v. Hyde, the courts will find that a new

contract had been substituted for the old. Thus a lease of fifty acres at $5 per acre, upon which lease there was a surety, was changed by collateral agreement to a lease of the same fifty acres at $4 per acre, and the court held that the surety was discharged, as there was an entire substitution of a new contract in place of the old. The surety's risk may be varied by the creditor's breach of the contract and if this variation of the risk can by any possibility constitute an increase of that risk the surety will have a complete defense. Thus, in Calvert v. The London Dock Co.,[18] the creditor party advanced money to the debtor party so that he might finish a building which he was constructing for the creditor party; these advances by the creditor party to the debtor party were in excess of what the creditor party had agreed to pay the debtor party, and the court held that the surety for the debtor party was discharged. It is clear that in most cases the creditor party, making these advances to the debtor party, benefits the surety and in any particular case it might be that the act of the creditor was actually beneficial to the surety, but the court would not listen to proof of such fact if the acts of the creditor have by possibility increased the risk of the surety.

That the surety's defense rests not upon actual injury by the intermeddling or breach of duty by the creditor, but upon a possible increase in the surety's risk, is well illustrated in cases where the creditor party has agreed to insure the tools of the debtor party and the debtor party makes default not by

[18] 2 Keen 638 (Eng.), LEADING ILLUSTRATIVE CASES.

reason of the failure of the creditor party to take out the insurance as agreed, but for entirely distinct reasons, and the surety party is sought to be held. In such case the surety has a complete equitable defense. It makes no difference whether any actual injury or harm comes to the surety because of the acts of the creditor if the acts or omissions of duty have by possibility increased the surety's risk.[19] The variation of the surety's risk in order to give the surety a defense must have been occasioned by the creditor's intermeddling or failure to perform a duty arising out of or closely connected with the obligation upon which the surety is bound. For example, in Parke & Lacy Co. v. White River Lumber Co.,[20] a creditor sold one machine to a farmer, taking his note and a surety, and he sold the farmer another machine, which was worthless, taking the note of the farmer and the same surety. The court held that the surety was not discharged from his obligation on the note given for the good machine because of the variation of the surety's risk caused by the creditor's selling the debtor a worthless machine, for the transactions are independent. Again, where a creditor loaned money to a debtor who took a surety, and then taught the debtor a game of chance which ruined the latter, it was held that this variation of the surety's risk did not give the surety a defense because it was an unrelated transaction.

67. **Fraud or misrepresentation of the obligee.** —The fraud or misrepresentation of material facts

[19] Watts v. Shuttleworth (1860, 1861), 5 Hurlst. & Norm. 235, 7 Hurlst. & Norm. 353 (Eng.), LEADING ILLUSTRATIVE CASES.

[20] 110 Cal. 658.

by the creditor, or by the principal with the creditor's knowledge or consent, which would, if known to the surety, have kept him from signing the contract, or which have the effect of increasing his liability, will discharge the surety from his obligation.[21]

Thus a misrepresentation as to the use to which the note signed by the surety was to be put, was held to discharge the surety.[22] And if the surety's signature is obtained on condition that another shall also sign as surety, such condition, being agreed to or known to the creditor who takes the obligation, will, if unperformed, discharge the surety.[23] And, in general, a surety will not be bound where he signs upon a condition which the creditor has notice of unless such condition is complied with.[24] Of course, the fraud or misrepresentation of the principal in inducing the surety to sign will not release such surety, unless the creditor have notice of the fraud or of the condition which has not been fulfilled.[25] It is the misrepresentation of an existing fact, and not of a mere unexecuted intention, that will discharge the principal. So where the retiring partner induced the other to assume the debts by representing that he would forever retire from the like business, and did not do so, it was held not to be such a fraud as would discharge the surety.[26]

[21] Bank of Monroe v. Anderson Bros., etc., Co., 65 Iowa 692; Putnam v. Schuyler, 4 Hun 166 (N. Y.).

[22] Ham v. Greve, 34 Ind. 18.

[23] Cowan v. Baird, 77 N. C. 201.

[24] Jones v. Keer & Hope, 30 Ga. 93; Brandt, Suretyship and Guaranty, § 451.

[25] Rothermal v. Hughes, 134 Pa. St. 510, Whitcomb v. Miller, 90 Ind. 384; see text, § 72.

[26] Gage v. Lewis, 68 Ill. 604.

The concealment on the part of the obligee which will work a discharge of the surety must be material, that is, a concealment of some fact or circumstance immediately affecting the liability of the surety, and bearing directly upon the particular transaction to which the suretyship attaches.[27]

68. **Failure to disclose facts.**—The general rule is that non-disclosure of material matters does not exonerate the surety. Things consistent with the ordinary business risk need not be disclosed. Thus the creditor is under no obligation to disclose to the surety that the borrower was already indebted in a large sum to the creditor,[28] or to disclose to the surety of a lessee that the lessee was in arrears on a prior lease,[29] or that the principal was financially weak or insolvent,[30] or that the principal was gambling;[31] but some matters are so very material and so very different from what would be expected in the ordinary course of business that the law imposes a duty upon the obligee to disclose. A duty is imposed upon the obligee to disclose to the surety that the principal obligor has embezzled,[32] or that the principal debtor is paying a price in excess of the market price for goods, the excess to be applied on a prior debt to the creditor.[33]

Of course there is no duty on the obligee to disclose

[27] Brandt, Suretyship and Guaranty (3rd ed.), § 419; Comstock v. Gage, 91 Ill. 328.

[28] Hamilton v. Watson, 12 Cl. & F. 109 (Eng.).

[29] Roper v. Cox, 10 L. R. Ir. 200 (Eng.).

[30] Magee v. Manhattan Co., 92 U. S. 93.

[31] Atlas Bank v. Brownell, 9 R. I. 168.

[32] Smith v. Bank of Scotland, 1 Dow. 272 (Eng.).

[33] Pidcock v. Bishop, 3 L. J., K. B. 109 (Eng.).

facts where he is ignorant of the facts or where he knows the surety knows the facts. The surety's defense is not based upon the moral turpitude of the creditor, but the duty to disclose is imposed upon the creditor because the circumstances are so extraordinary that they require disclosure. The creditor does not have to wilfully and intentionally conceal facts from the surety, but if he possesses knowledge of facts which are of a nature that demands disclosure, his failure to reveal them to the surety gives the surety a defense. It is a requirement laid down by the law on the basis of a reasonable person. The creditor owes no duty to investigate, but if he possessed facts which would clearly create suspicion in the mind of a reasonable person, but which created no suspicion in his mind, his failure to disclose these facts would excuse the surety. If the surety requested information from the obligee and the creditor failed to make a full disclosure of everything within his knowledge that would naturally influence the surety's decision in entering into the obligation, the surety is given a defense.[34] The doctrine that the obligee must disclose material facts to the surety has been held to be inapplicable in cases of suretyship for municipal or state officers.[35]

69. **Failure to discharge employee.**—It is a duty an employer owes the surety who who has guaranteed the honesty or faithful conduct of the employee, to discharge the employee when he learns of criminal or grossly immoral acts on the part of the latter

[34] Remington Sewing Machine Co. v. Kezertee, 49 Wis. 409.
[35] Ames, Cases on Suretyship, p. 290.

which would vary the surety's risk. Thus, it is the duty of the employer to the bondsman of the employee to discharge the employee when he learns that he is embezzling funds for which the bondsman is answerable.[36] It is sometimes stated that the duty imposed upon the obligee in such cases is to disclose to the surety the wrongful acts of the servant, but this theory as to the duty of the employer will not explain the law. For it is the law that if the defendant guarantees the honesty of the plaintiff's servant and afterwards the servant commits embezzlement and the plaintiff with knowledge of the embezzlement retains him without giving notice to the surety, the surety will not be excused from the obligation to make good the first embezzlements or those committed by the servant before the plaintiff discovered the wrongdoing, but he will be excused from making good all deficits due to the embezzlement of the servant committed after those discovered by the plaintiff.[37] If the ground of the surety's defense to the obligation is the failure of the creditor to disclose the defalcations of the servant, it would seem that the surety would have a defense when the plaintiff sought to hold him for the first embezzlement as well as for subsequent ones. For after the first embezzlement, had it been disclosed to the defendant, he might have saved himself from any liability because of it. Since the duty, however, of the obligee to the surety is one to discharge the servant, rather than to disclose his defalcation, the surety's defense is only for the defal-

[36] Philips v. Foxhall, L. R. 7 Q. B. 666 (Eng.).

[37] Same as note 36; Brandt, Suretyship and Guaranty (3rd ed.), § 477.

cations during the period the employee is retained after the employer learns of the defalcation.

This obligation of the employer does not extend to every wrongful act of the employee. He is not liable to the surety for retaining the faithless servant after he has done some negligent act which would make the surety liable. For all acts of criminality and acts constituting gross immorality that would vary the surety's risk, though not punishable by law, the employer owes the surety the duty to discharge the employee.[38]

70. **Defenses of the surety arising from dealings of the creditor and co-sureties.**—At common law a release of one of several joint debtors or a release of one of several joint and several debtors discharges the others. Whatever may have been the basis of this rule, it seems to have been well established.[39]

It would seem to follow, then, that an agreement by the creditor to release one of several co-sureties who were bound either jointly or jointly and severally would at law discharge the other co-sureties from all liability on the obligation, for it is the general rule in this country that an unqualified release of the surety upon a joint or joint and several obligation discharges the other sureties.[40]

As the release of one of several co-sureties, however, affects his fellow co-sureties only to the extent that such sureties would have a right to contribution from the surety released, it would seem just that the

[38] Watertown Fire Ins. Co. v. Simmons, 131 Mass. 85.
[39] Williston, 25 Harvard Law Review 206-207.
[40] Ames, Cases on Suretyship, p. 323, note.

surety's defense in such case should not extend beyond the amount which the released surety would be under obligation to contribute, and equity should therefore relieve from the harshness of the rule which would completely discharge the surety not released.[41]

If the surety released by the creditor is one of several co-sureties who are bound severally, not jointly, or jointly and severally, the result is the same. The remaining sureties who are sued by the creditor upon the debt clearly cannot have a defense beyond the extent the released surety would have been liable to contribute, for there is no harsh rule of law discharging the unreleased obligors to be set aside or cut down by equity, but only an equitable defense to the extent of the co-sureties' possible injury.

On the other hand a covenant by a creditor not to sue one of several, or joint and several obligors would not affect a discharge of the other obligors at law so a covenant not to sue one of several sureties has the same legal effect upon the remaining obligors whether the obligation is joint, joint and several, or several. The covenant not to sue one of several co-sureties gives the remaining sureties a defense to the extent that they could call upon the covenantee for contribution. The reason for this rule is the same as that explained in the case of the creditor's releasing the principal debtor.[42]

If, however, the creditor in covenanting not to sue one of the sureties reserves the rights against the other co-sureties, the other co-sureties are not given a

[41] See Williston, 25 Harvard Law Review 229, note 25.
[42] See text, § 58.

defense. On principle this seems to be impossible to reconcile with the case of the creditor's extending time to one of several co-sureties where, although no harm happens to the others, they are given a defense to the extent of the ultimate burden the released surety would have to bear.[43]

In jurisdictions where the creditor is bound to sue the principal debtor on request of the surety a failure of the creditor to sue at the request of one of the sureties gives the other a defense to the extent he is thus deprived of contribution from the surety.[44]

71. Surety's right to avail himself of the set-off or counter-claim.—If there is failure of consideration to support the obligation of the principal debtor, the surety may avail himself of that as a defense when sued by the creditor, but if the debtor has a right of set-off or counter-claim against the creditor, the surety when sued alone at law cannot use the set-off or counter-claim of the debtor against the creditor.[45]

Where the surety is sued jointly with the principal debtor he may use a set-off or counter-claim of the principal.[46]

The reason the surety when sued alone is not allowed to make use of the set-off or counter-claim of

[43] Gosserand v. Lacour, 8 La. Ann. 75; Ames, Cases on Suretyship, p. 325, foot-note; see text, § 58.

[44] Klingensmith v. Klingensmith's Executors, 31 Pa. 460.

[45] Ames, Cases on Suretyship, p. 181, foot-notes. The statement in Brandt, Suretyship and Guaranty (3rd ed.), § 259, p. 511, that by "the weight of authority" the surety "may so avail himself of such set-off," is in need of qualification. Many of the cases he cites are cases in which the principal debtor and the surety are sued jointly and the surety is allowed to avail himself of the set-off in favor of the principal debtor.

[46] Mahurin v. Pearson, 8 N. H. 539; Ames, Cases on Suretyship, p. 191, foot-notes.

the principal debtor is that it might deprive the debtor of his right to sue the creditor for a larger sum than that for which the surety was liable and because in making use of such defense the surety is using a personal defense of the debtor which he may not use as effectively as the debtor himself would.

On principle it would seem the surety would have the right in equity to have the principal made a party and avail himself of the set-off or counter-claim of the principal.[47]

[47] Brandt, Suretyship and Guaranty (3rd ed.), § 259.

CHAPTER VII.

MISCONDUCT OF THE PRINCIPAL, ACCIDENT, MISTAKE, OR DEATH OF THE SURETY.

72. **Fraud or other misconduct of the principal towards the surety.**—Where the obligee takes a legal obligation of the surety without notice of the fraud or misconduct of the principal in securing the surety's obligation, the surety cannot set up the unconscionable conduct of the debtor as a defense to a suit by the obligee. The obligee gets a legal obligation without notice of the surety's equities and he is in a position of a purchaser of the legal title to property who pays value without notice of any equity and whose legal title is allowed to prevail over the equity. It is the principle of a purchase of a legal title for value without notice cutting off equities. Thus if a surety has been induced by the maker of a note to sign the note as surety upon condition that the maker is not to deliver the note to the payee until he gets A also to sign as surety the payee in such case may hold the surety after the maker delivers the note to him without securing A's signature but B's instead,[48] or where the surety signs a bond with blank space for the amount and delivers it to the debtor with the direction that it is not to be filled up for more than $4,000 and the debtor fills up the blank space for $15,000 and delivers it to the creditor who takes

[48] Ward v. Hackett, 30 Minn. 150.

it without notice of the debtor's misconduct, the creditor may hold the surety upon the bond for $15,000.[49]

So a surety who signs a negotiable note in blank is liable to a bona fide holder where the maker fills up the blanks in disobedience of instructions.[50]

The case of an obligation of the surety secured by the duress or fraud[51] of the principal debtor illustrates this general principle that the surety cannot set up as a defense against the innocent creditor the misconduct of the debtor.

Where, however, the creditor has notice or can properly be charged with constructive notice of the misconduct of the debtor in securing the surety to sign the obligation, he cannot hold the surety liable. He will be charged with constructive notice of the condition upon which a surety signs, where the surety signs on condition that it shall not be given to the obligee until some other person signs, if that other person's name appears in the body of the instrument. "But the absence of the signature of one held as surety, creates no presumption that there was in fact a conditional delivery by the surety who signed." The surety must show that there was such a conditional delivery.[52]

73. **The effect of accident or mistake on the surety's obligation.**—If the creditor loses his bond he may in an equitable action have the bond restored. The creditor's right at law is gone but in equity it is

[49] Butler v. U. S., 21 Wall. 272 (U. S.).
[50] Ames, Cases on Suretyship, p. 314, note.
[51] Lucas v. Owens, 113 Ind. 521.
[52] Ames, Cases on Suretyship, p. 306, note.

not. The creditor may have a new bond executed by the obligors and he has this right even if one of the obligors is a surety. The obligee has this right where a bond is lost or casually destroyed, whether he is a mere donee and has taken the bond without consideration or whether he has paid value for it.[53]

If the loss has occurred for which the bond was given or the right of action has accrued to the obligee upon the bond, it would seem that he should be given the right to recover directly without going through the useless formality of having the bond restored. Of course, if the bond was secured by fraud, if there was any defense to the action the surety might defeat recovery. If the release of the bond was procured by fraud then equity would set it up again.[54]

If the instrument by reason of a mistake of the parties fails to express their intention, the creditor may have reformation of the instrument against the surety as well as against the principal debtor.[55]

74. **The effect of the death of the surety on the surety's obligation.**—Where the surety's obligation is joint, and the surety dies, the rule of the common law that the obligation survived against the joint obligor and the deceased joint obligor's estate was relieved from liability, persists at law to-day. In the case of joint principal debtors the rule formerly was that in case one died the obligee could not hold the estate of the deceased but only that of the survivors. This doctrine of survivorship does not generally per-

[53] Underwood v. Staney, 1 Cases in Ch. 77 (Eng.).
[54] Skip v. Huey, 3 Atk. 93 (Eng.).
[55] See cases in Ames, Cases on Suretyship, p. 330, note.

sist in this country today and equity relieves from the harshness of the rule and allows the creditor to come against the estate of the deceased obligor. Equity, however, will not relieve from the rule of survivorship in case of the death of the surety who is bound jointly with the principal debtor. The surety's estate escapes liability unless the creditor does not know of the suretyship relation. If the creditor obtains a separate judgment against the debtor and the surety, the death of the surety does not let the surety's estate escape. Where the surety has entered into a binding contract in the form of an obligation joint and several, or several, the death of the surety does not relieve his estate from liability. In the case of joint and several obligations the rule of survivorship which formerly applied to joint obligations does not exist and therefore the deceased surety's estate does not escape liability. In a great many states joint obligations are expressly made joint and several by statute. In such states the surety's estate, though the surety is bound jointly with the principal debtor, does not escape liability by the death of the surety.[56]

Where there is a binding contract of suretyship when the surety dies, the surety's estate may be held. If there is no such contract his estate is not liable. If he has entered into an arrangement which constitutes merely an offer to a series of unilateral contracts, the death of the surety as well as withdrawal of the offer before acceptance prevents a contract from arising. An offer cannot be accepted after the death of the offerer. If it is binding upon the alleged offerer's

[56] Ames, Cases on Suretyship, p. 332, note.

estate it is because there is something more than an offer: to illustrate, if a merchant wishes to purchase goods from a wholesale house from time to time upon credit, and the wholesale house requires the merchant to furnish a surety, and the merchant gets A to offer to the wholesale house to guarantee that the merchant will pay for all goods that he may order from the house and which the house will sell and deliver to him within the year to the extent of $1,000 and A dies before the house ships any goods to the merchant, A's estate is not liable for the goods sold or delivered to the merchant after his death. Death alone without notice is sufficient to prevent an acceptance thereafter of A's offer. On the other hand if A, by instrument under seal or for consideration, agrees to answer for all goods sold to the merchant and A dies, the warehouse may hold A's estate for all goods sold or shipped before it received notice of A's death, but it cannot hold A's estate for sales made after notice of A's death. The reason it cannot hold A's estate in this last case is that it is inequitable to hold the incautious guarantor for everything he has promised. It is inequitable to create a new obligation upon the surety's estate after notice of the surety's death. If the plaintiff takes a note before maturity and for value after the death of the maker but without notice of the accommodation character of the note, it is not inequitable for the plaintiff to enforce it against the estate,[57] and if the plaintiff takes the note with notice that it was an accommodation note but without notice of the maker's death, there is likewise no

[57] Clark v. Thayer, 105 Mass. 216.

equity to urge against the creditor's enforcing it.[58]

But if the plaintiff takes the note with notice both of its accommodation character and the death of the surety maker, it is inequitable for the plaintiff in such case to charge the estate of the deceased party.[59]

To return to the warehouse case suggested previously,—if we suppose there is a provision in the agreement which A makes with the warehouse that A shall give three months' notice of his intent to revoke the offer he cannot revoke during his life without giving the three months' notice. In case, however, A should die and notice of his death should come to the warehouse, it could not hold A's estate for the goods so sold. The estate would not be liable for three months after it gave notice of intent to revoke. Of course, A could agree that his estate should be bound for three months after notice of his death, and that would bind his estate according to the terms of the contract. However, when the parties have made no provision in their contract with respect to the death of the surety, the creditor cannot hold the surety's estate for goods sold or advances made after he has received notice of his death. In the case of a guaranty of the faithfulness of an employee, if the employer or creditor party is bound for the life of the employee, the guarantor cannot revoke his guaranty during his life, and his death and notice thereof likewise will not act as a revocation of the guaranty.[60]

[58] See foot-note, Ames, Cases on Suretyship, p. 334; citing Michigan Ins. Co. v. Leavenworth's Estate, 30 Vt. 11, as contra.

[59] Agawam Bank v. Strever, 18 N. Y. 502; Dogan v. Dubois, 2 Rich. Eq. 85 (S. C.).

[60] Lloyds v. Harper, 16 Ch. Div. 290 (Eng.); Balfour v. Crace (1902), L. R. 1 Ch. 733 (Eng.), LEADING ILLUSTRATIVE CASES.

PART IV

RIGHTS OF THE CREDITOR

CHAPTER VIII.

THE RIGHT OF THE CREDITOR TO THE SECURITIES HELD BY THE SURETY.

75. **General nature of the right.**—Where the principal debtor gives securities to the surety to indemnify him against the payment of the debt, these securities are subject in certain contingencies to the equitable claim of the creditor and may be used by him although they did not influence him in giving credit to the principal or were not even known of by him,[61] and this is true although the securities were given to the surety after the debt in favor of the creditor was created.

Let us examine the matter to see upon what ground the creditor's right to these securities rests. If the principal debtor put the securities into the hands of the surety to be applied in payment of the debt, in other words, if an express trust is created and the debtor defaults, then the creditor could come into equity joining the debtor and surety and have the securities applied for his own benefit. The question arises then, has the creditor any right to the securities deposited by the debtor with the surety for his indemnity in the absence of an express trust to apply

[61] Kramer & Rahm's Appeal, 37 Pa. St. 71; Owens v. Miller, 29 Md. 144.

these securities in payment to the creditor? Even in the absence of an express trust, if the debtor put the securities in the surety's hands for his exoneration and the surety becomes bankrupt, the creditor could by means of equitable execution insist upon applying the securities according to the terms of the pledge or mortgage. The creditor would thus be a preferred creditor of the surety to the extent of the securities deposited with him for exoneration; but in absence of an express trust it seems difficult, on principle, where securities are deposited with the surety for his reimbursement, to defend the law in giving the creditor the advantage of these securities.

The law does not purport to restrict the creditor's right to those cases where the securities have been deposited with the surety either upon an express trust to apply them in payment of the debt or to those cases where they have been deposited with the surety for his exoneration. The law permits the creditor to have the benefit of the securities in the case where they are deposited with him for his indemnity. For example, if no suit is brought upon the obligation by the creditor for more than six years (the statutory period of limitation of actions) after the debt is due, the creditor has no right to the securities in the surety's hands. The Statute of Limitations is thus made the only defense to the creditor's right to use the securities. If the securities were a trust fund for the benefit of the creditor, the Statute of Limitations would not run against the creditor's right to have the securities applied in payment of the debt. If the securities are released by the surety before his insol-

vency the creditor has no further interest in them and no right to object to their release.

76. **When the right arises.**—Most of the American cases do not give the securities to the creditor unless insolvency of the surety intervenes and the securities are found in the hands of the surety at the time of insolvency. It is a strange thing that if the right does not exist before insolvency that insolvency should be the thing which creates the preference. It is a general rule in bankruptcy that priorities must exist before bankruptcy in order to be respected in bankruptcy.[62]

77. **Limitations upon the right.**—There are some limits upon the rights of the creditor to realize upon these securities even after the insolvency of the surety; for example,—if the surety should himself give a mortgage to the creditor to secure the debtor's obligation and the debtor should give a mortgage to the surety for his reimbursement and both become bankrupt, to permit the creditor to realize upon the mortgage the surety has given him and also the mortgage which the debtor has given the surety for his reimbursement, would be robbing the estate of the surety. In such case the creditor was not permitted to realize upon the securities given to the surety for his reimbursement.[63]

Where the indemnity fund or security given by the principal to the surety is "against a contingent liability," there can be no substitution in favor of the

[62] Jones v. Quinnipiack Bank, 29 Conn. 25; authorities cited in foot-note 1, Ames, Cases on Suretyship, p. 644; First Nat. Bank v. Davis et al., 87 Mo. App. 242, LEADING ILLUSTRATIVE CASES.

[63] Van Orden v. Durham, 35 Cal. 136.

creditor until the liability has become absolute. "If a mortgage or other security is given to the surety, not to secure the debt or provide a fund for its payment, but to save harmless from a contingent liability or loss, that contingency must come or the injury be sustained before a right to the indemnity inures to the creditor."[64]

It is also held that indemnity given to the surety by a stranger or by a co-surety, cannot be claimed by the creditor.[65]

Nor can the creditor use indemnity given the surety after such surety has been discharged, since the possibility of the surety being damnified has ceased with his discharge.[66]

78. **Summary of the law of creditor's rights to surety's securities.**—The English courts permit the creditor to take advantage of the securities only upon the contingency that both principal debtor and surety are insolvent. When these are both insolvent the creditor has a prior lien to the extent of the securities. On the other hand, the majority of the American cases hold that where a principal debtor gives his surety securities for his reimbursement, those securities before bankruptcy of the surety are not subject to the prior claims of the creditor; but when the surety becomes insolvent the creditor has a prior lien to the extent of those securities and may prove against the surety's estate with other securities for the balance of his claim.

[64] Per Simrall, J., in Osborn v. Noble, 46 Miss. 449.

[65] Taylor v. Farmer's Bank, 87 Ky. 398; Hampton v. Phipps, 108 U. S. 260.

[66] Constant v. Matteson, 22 Ill. 546.

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The best known work on the subject of Suretyship and Guaranty is that of Brandt, the third edition of which was published in 1904. It is an extended work of two volumes of over fourteen hundred pages of text matter. While an excellent work in many respects, it is too extensive for students' use. Older works that deserve mention here are Stearns, published in 1902, and Pingrey, 1901. A more recent book and one perhaps more adapted to students' use is that of Childs on Guaranty and Suretyship, published in 1907. The most scholarly collection of authorities on the general subject of Suretyship and Guaranty is that contained in Ames' notes to his Cases on Suretyship, but as there is no index to this matter it is difficult of access.

LAW OF MORTGAGES REAL AND CHATTEL

BY

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PART I

THE MORTGAGE TRANSACTION

CHAPTER I.

DEFINITION AND HISTORY.

1. **The mortgage defined.**—A mortgage may be defined as a transfer of property, real or personal, for the purpose of securing the payment of a debt or obligation. It is usual to add that the transfer must be such that it is to become void on payment of the debt or obligation secured. But this additional statement may become misleading. It is sufficient if it be kept in mind that the principal element of the transaction is the securing of the debt—the transfer or conveyance is only a means to that end.

No effort is here made to state the variety of situations to which this definition is to be applied. It is general enough to avoid error, though perhaps it is not sufficiently exclusive to be of great value. The difficulty of framing a definition of a mortgage

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which would be of certain application involves also a risk of inaccuracy, and for this reason it is not attempted. As said by Lord Denman, "It is very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other, in any other terms than those very words."[1]

2. **Other terms defined.**—The person who makes the transfer or conveyance is called the mortgagor, and he to whom it is made is called the mortgagee. The date set for the payment of the debt or obligation secured is called the "law day." The interest of the mortgagor is often called his "equity." By this is meant the mortgagor's right to go into a court of equity, as distinguished from a court of law, to compel a reconveyance of the mortgaged property, or to enforce the security limit on the mortgagee's interest. If several mortgages are given on the same property, the first is called a senior or prior mortgage, and the others junior or later mortgages.

3. **Early history.**—Since very ancient times, transfers of property for the purpose of securing debts have been the usual protection afforded to creditors. The custom must have prevailed among the Egyptians; it was quite common among the Jews, and the Romans had a well developed system of securities which is no doubt "the spring-head of English jurisprudence on the subject."[2] Prior to the Norman Conquest in 1066, the pledge of property for a debt was used by the Anglo-Saxons. "It would seem that the primitive idea of giving mortgages

[1] Doe & Higginbotham v. Barton, 11 Adol. and Ell. 307, 314 (Eng.).
[2] Justice Swayne in Gilman v. Illinois, etc., Tel. Co., 91 U. S. 603, 615.

ought to be referred more to the introduction of order and civilization among mankind than to the invention of any particular people."[3] "The use of mortgages is founded on the wants and convenience of mankind and would naturally follow the progress of order, civilization and commerce."[4]

The Anglo-Saxon custom survived the Conquest and flourished in feudal England. Domesday Book, which was compiled during the reign of William the Conqueror, contains numerous references to mortgages. In the time of Glanville, who wrote during the reign of Henry II (1154-1189), there were two distinct forms of pledges of land for security, the vivum vadium and the mortuum vadium. It is probable that both of these were adopted from the customary law of Normandy.

4. **Vivum vadium.**—The vivum vadium was what its Latin name indicates, a live pledge of lands. It was effected by a common law conveyance of lands by livery of seisin (such conveyance being called a feoffment) to the creditor to enable him to satisfy his debt out of the rents and profits of the land. The feoffee or creditor took a legal estate in fee simple to be determined on the complete satisfaction of the debt. He was therefore entitled to possession until the debt was fully paid, but at that time his estate was determined and the debtor might thereafter reenter or maintain his action for the possession.

This was called a live pledge because neither the debt nor the estate was lost, and the creditor actively

[3] Pingrey, Mortgages, p. 2.
[4] 4 Kent, Commentaries, p. 137.

enjoyed the security. Its use was in the time of Glanville fairly general, but it has long since become entirely obsolete. It was never very satisfactory to creditors, who desired the payment of their debts in lump and who did not care to be bothered with small instalments of the larger amounts due. From the debtor's viewpoint, also, it has been condemned: "No mortgagee or mortgagor ever yet made a contract, upon which the possession was to change immediately, unless it were the veriest grinding bargain that could be driven with a distressed man, who had no way to turn."[5]

5. **Mortuum vadium.**—By the mortuum vadium, or dead pledge, the creditor was invested with an estate subject to a condition reserved to the feoffor, or debtor, and his heirs, by which the conveyance was to become void on the payment of the debt or obligation. The creditor, as legal owner, became entitled to the rents and profits of the land until the happening of the condition and he had no obligation to apply them in satisfaction of the debt. During this interval, therefore, the estate was unprofitable or dead to the debtor who had mortgaged it—hence the name, dead pledge. The condition that it will determine on payment of the debt is entirely collateral to the estate held by the mortgagee, whereas in the vivum vadium it was an inherent quality of the estate that it should determine on the satisfaction of the debt—a real limitation of the duration of the interest conveyed. Out of this mortuum vadium, the common law mortgage has developed.

[5] Judge Ruffin, in Poindexter v. M'Cannon, 16 N. C. 373.

6. **The common law mortgage.**—The original mortuum vadium must have fallen into disuse prior to the time of Littleton (1481), for the mortuum vadium of which he speaks is no more than the common law estate on condition. The debtor enfeoffs his creditor and his heirs subject to a condition subsequent, viz., that if the debt be paid on the law day, the feoffor should have a right to reënter. The feoffee has as a result the legal estate subject to a condition, which condition must be performed in strict accordance with its terms in order to defeat his estate. He is therefore entitled to possession and may enjoy the land as his own, with no legal obligation to account to the debtor. If the condition be not performed by the mortgagor, the mortgagee will become absolute owner and his estate can be divested from him only by a conveyance. A payment of the debt before or after the law day would not be a performance of the condition, and in theory no tender could operate to defeat the mortgagee, since a tender is effectual only to stop the running of interest and not as a payment of the debt. But the actual decisions permitted a tender on the law day to divest the mortgagee's estate.

While conditions generally were not favored by the law, because they usually operated to destroy estates, the mortgage condition was viewed more favorably as preserving the interest of the mortgagor.[6] But, even so, a complete adoption of the common law theory of a mortgage as a conveyance of an estate on condition, would leave the law court

[6] Coote, Mortgages (8th ed.), vol. I, p. 4.

powerless to prevent a forfeiture by the mortgagor. The tardiness of the law courts in escaping from this result led the courts of equity to take jurisdiction when it was necessary to prevent a forfeiture. The growth of equity jurisdiction was due to the necessities of just such situations as these—where the remedies in law courts were grossly inadequate, the law judges were not inclined to legislate new ones. Gradually the King and his Chancellor opened their doors to aggrieved persons who had no redress at law. The extension of equity jurisdiction to mortgages was a great step forward.

7. **Redemption in equity.**—When the primary object of the parties to a conveyance was that a creditor should be sure to have payment of his debt, it was felt to be a hardship on the debtor to have to forfeit all rights in the mortgaged property where the condition was not strictly performed, if the creditor could be paid in such way that the nonperformance of the condition should not have prejudiced him. By the middle of the seventeenth century, it became an established doctrine that a court of equity, acting on the conscience of the mortgagee, would not permit him to enjoy absolutely what was intended to be only for his security. The breach of the condition was regarded as a penalty on the mortgagor, and though the forfeiture of his estate was complete at law, it could be relieved against by the equity court's permitting the mortgagor to redeem his property on rendering to the mortgagee complete satisfaction of the mortgage debt, with interest and costs. The position of the mortgagee soon

became analogous to that of a trustee who, though the owner of the legal title, is bound to hold it for another.

In their efforts to escape the consequences of this doctrine, the money lenders endeavored to avail themselves of their legal rights by stipulations in their agreements with borrowers which would destroy the latter's right to redeem—as the expression goes, by clogging the equity of redemption. But the equity courts were zealous in protecting mortgagors even against their own stipulations of this sort, and refused to permit the enforcement of the bargain beyond the security. This equity practice is the basis of the maxim, "Once a mortgage, always a mortgage."

8. **The modern mortgage.**—As a result of equity's taking jurisdiction, the modern mortgage is a very different thing in law and in equity. The recognition by each court of the other's jurisdiction has resulted in some modification of the common law theory of mortgages even in the law courts. The mortgagee, though regarded as owner, will be restricted even in a law court to a use of the property consistent with the mortgagor's equitable rights. The equity view has so far influenced some American courts of law that they deny the legal effect of the mortgage conveyance, and say that it creates only a lien. Other courts deny to the mortgagee the position of owner until after default by the mortgagor.

Three different theories may be said to exist in the United States. They will be examined in a later chapter.

9. **Welsh mortgages.**—The so-called Welsh mortgage, which is rarely used in the United States but common in England, is a conveyance of an estate as security for a debt, the creditor to receive the rents and profits as a substitute for interest. It closely resembles the vivum vadium of Glanville's time. The mortgagor may redeem at any time, though he cannot be forced to do so by the mortgagee. If the rents are also to be applied in reduction of the principal, the mortgagee ought to be compelled to account at the request of the mortgagor.

10. **Formal and informal mortgages.**—The conveyance of land by way of mortgage may in its terms be stated to be for security only, in which event it is a formal mortgage. If made for the purpose of security, though in form a complete transfer without any reference to the debt, it is an informal mortgage. The latter will not in any case be a conveyance on condition, no condition being stated. But it will be seen that a court of equity may restrict it to the purpose for which it was made, though a court of law would be bound under all circumstances to respect it as an absolute conveyance.

11. **Legal and equitable mortgages.**—Certain transactions which cannot in a court of law create a mortgage relation, may be regarded by courts of equity as having that effect. Equity will look at the substance, and if a security was intended will regard that as a mortgage which, because of a formal defect or for want of something to be done which ought to be done, cannot be so regarded at law. The equitable mortgage may be formal or informal. Its effects may

be different from that of a legal mortgage where the rights of third persons are involved. The term equitable mortgage should not be confused with the expression, equitable view of a legal mortgage. In an equitable mortgage, no legal title is conferred on the mortgagee.

Under the equitable view of a legal mortgage, a legal interest is conferred on the mortgagee, but it is not the actual title to the mortgaged property.

CHAPTER II.

THEORIES OF A LEGAL MORTGAGE.

12. **The original title theory.**—The history of the mortuum vadium has been traced in the preceding chapter to the time when it became a common law conveyance on condition, when the original title theory may be said to have prevailed. This theory has in it nothing which is individual to the law of mortgages. The condition that the money due be paid at a certain time, is not to be viewed differently from a condition that A should return from Rome on a certain day. An estate subject to a condition is in nowise less dignified than an absolute estate, and the holder of one is entitled to all the incidents which a holder of the other may enjoy. Thus, in an anonymous case decided in 1562, a lessor mortgaged his reversion to his lessee and later paid the money on the law day, but because a merger occurred as a result of the conveyance to the lessee, the lease was not thereafter revived.[7] The legal interest remaining in the mortgagor, on the other hand, cannot be dignified with the name estate—though sometimes spoken of as a possibility of reverter, it would be more properly called simply a right of entry on condition broken. Even if the condition were performed, the strict theory would require an entry to determine the mortgagee's estate.

[7] 3 Leonard 6 (Eng.).

13. **The present title theory.**—In many respects the rigor of the common law rules has been avoided. The law of mortgages now has more individuality, even where in theory the mortgagee is owner of the legal title. The mortgagee is still entitled to possession, and if the mortgagor remains in possession as the result of an agreement he is merely tenant to the mortgagee. But it is usual for even courts of law to regard the mortgagor in possession as owner except as against the mortgagee. Crops raised by a mortgagee in possession belong to him as further security, though he must account for them as for other security in equity. But crops raised by a mortgagor in possession do not belong to the mortgagee, and the mortgagor need not account for them.[8]

This title theory of mortgages prevails today in England, and in perhaps one-half of the jurisdictions in the United States.[9]

14. **The lien theory.**—It is probably a result of the greater influence of the money-borrowing classes that in many American jurisdictions the common law view of mortgages is no longer accepted, but has been supplanted by the so-called lien theory. The first steps in establishing this doctrine were taken in cases where a mortgagee attempted to get possession from a mortgagor before default in payment. Lord Mansfield is probably responsible for this conception, though his views were not accepted in England. He is quoted in the early New York case, which per-

[8] Ex Parte Wilson, 2 Ves. and B. 252 (Eng.).

[9] For American jurisdictions, see Jones, Mortgages (6th ed.), vol. I, pp. 16-38. Toomer v. Randolph, 60 Ala. 356, LEADING ILLUSTRATIVE CASES.

mitted a purchaser of a mortgagor's title to maintain an action of trespass against the mortgagor.[10] The next step was taken when the mortgagee, even after default, was denied the right to possession; and the anomaly of denying to a conveyance of property for security any efficacy for the passing of the title, was complete.

A good statement of this New York view is made in Trimm v. Marsh:[11] "Here the mortgagor has, both in law and equity, been regarded as the owner of the fee, and the mortgage has been regarded as a mere chose in action; a mere security of a personal nature. At common law payment or tender at the law day extinguished the lien of the mortgage and reinvested the mortgagor, without a reconveyance by the mortgagee, with his title. But tender or payment after the law day did not have this effect, and in such case a conveyance was necessary.. But it has always been the law of this state that payment or tender, at any time after the mortgage debt became due and before foreclosure, destroyed the lien of the mortgage and restored the mortgagor to his full title: As the mortgagee had no title, a reconveyance was not required by the law as administered by our courts. So that here the term 'law day,' which occupies such a prominent place in the early decisions as to mortgages, has no particular significance. The mortgagor has his 'law day' until his title has been foreclosed by sale under the mortgage, and it is a misnomer in this state to call the mortgagor's right in

[10] Runyan v. Mersereau, 11 Johns. 534 (N. Y.).
[11] 54 N. Y. 599, LEADING ILLUSTRATIVE CASES.

the land, before or after default, an equity of redemption, a mere right to go into equity and redeem. * * * In this state the interest of the mortgagor in the land is the same before and after default, and is a legal estate, with all the incidents and attributes of such an estate."

15. **Some consequences of the lien theory.**—An important consequence of the holding that title is in the mortgagor before foreclosure and that the mortgagee has only a lien, is that the mortgagee can never avail himself of the additional security of the rents and profits. It is true, therefore, that less money can be borrowed on land in states where the lien theory prevails.

The interest of the mortgagee prior to foreclosure may be properly termed a lien. But it is not like the ordinary possessory lien at common law. It may be asserted against even a bona fide purchaser without notice, being a legal interest. The lien is so dependent on the debt that the two cannot be separated, and discharge of the debt ought to extinguish the lien. Even a tender of the amount of the debt should entirely destroy the lien, for it would thereafter be inequitable to enforce it. The existence of the lien has so much effect on the legal estate of the mortgagor, however, that it is still considered as an equity of redemption. Under the title theory, an assignment of the mortgage must have all the qualities and characteristics of a conveyance of the legal title, but the lien jurisdictions hold that any transfer of the debt will carry the mortgage interest. Even the indorsement of the secured note will have the

effect of passing the mortgagee's interest in the property, though it be land.

A very important consequence of the lien theory has been achieved where the theory itself is repudiated, in its effect on the appreciation of the title theory of mortgages. Numerous situations will appear during the course of this article where the rigor of the logic of the title theory has given way to the more temperate principles of the lien theory. The rules that the mortgagee's estate cannot be seized and sold on execution, and that his wife is not entitled to dower, even in the title jurisdictions, were in the beginning due to the influence of decisions in which the lien theory was consciously or unconsciously applied.

16. **An intermediate view.**—In several American jurisdictions, the lien theory has been adopted only to the extent that before default in payment of the debt the mortgagor is invested with title, but after default it is in the mortgagee.[12] The mortgagee is therefore permitted to maintain an action of ejectment to recover possession of the land after default by the mortgagor. Yet, a later payment of the debt will extinguish the mortgagee's title. The theoretical incorrectness of this view is very apparent. It involves the anomaly of a passing of the title to property as a result of the non-payment of the debt. If the conveyance is ever effective for this purpose, it ought to be at the time it is made and not at a later time. As a practical solution of the situation, this view has many advantages. Until the mort-

[12] Barnett v. Timberlake, 57 Mo. 499, LEADING ILLUSTRATIVE CASES.

gagor is actually at fault, the security element of the transaction is most emphasized; but after that time, he may well run the risk of the mortgagee's acting as legal owner. It is probably true that this intermediate view is the result of a misconception of the lien theory.

17. **Law in the United States.**—There is no complete adoption of a logical theory in any of the American jurisdictions. Where the lien theory prevails, it is usually the result of a statute. In Kansas, for instance, "a clear sweep has been made by statute."[13] Some statutes simply deal with the right to possession, but their general tendency is to adopt the lien theory completely. The lien theory is in the ascendant, and prevails in most of the states west of the Mississippi River. The title theory prevails in England and in most of the states east of the Mississippi River. It would be comparatively easy to state the logical results of either of these theories, but as a matter of practice, many modifications have to be made in applying any theory of mortgage law.

Nor is the same theory consistently followed in the decisions concerning mortgages of real and personal property. At common law, there was no "substantial difference in respect to the nature of a title between a mortgage of real and a mortgage of personal property."[14] Most of the so-called lien jurisdictions where a mortgage of realty passes but a lien to the mortgagee, give effect to a chattel mortgage as an outright transfer of title, which will become

[13] Chick v. Willetts, 2 Kan. 384.
[14] Prout v. Root, 116 Mass. 410.

absolute on default by the mortgagor. In Nebraska and Minnesota, the treatment of all mortgages, both real and chattel, is consistent and the legal title is held to remain in the mortgagor until divested by foreclosure proceedings and sale in pursuance of law.[15]

[15] Randall v. Persons, 42 Neb. 607.

CHAPTER III.

THE EQUITABLE MORTGAGE.

18. **Equitable and legal mortgages contrasted.**—Many transactions are purposed to afford a creditor security for his obligation, which cannot be called legal mortgages. All may not be done which it was intended should be done; the form of the instrument which is to operate as a conveyance may be defective; the subject matter of the transfer may be such that a law court will not recognize a mortgage of it; an agreement for security may stop short of including an intention for an actual transfer. In these and numerous other situations, courts of equity find the elements of obligation and security, and shape the transaction into a mortgage. Because they are cognizable only in equity courts, these transactions are called equitable mortgages. Unlike the legal mortgage, they create no real liens—there is only a personal right in the mortgagee.

19. **Deposit of title deeds.**—A typical example of equitable mortgages is a transaction wherein the title deeds of real estate are deposited with a creditor as security for a debt, the debtor agreeing expressly or impliedly that the deeds may be kept until the debt is paid and that the creditor shall have a security interest in the land. Though it is commonly employed in England, the method is not common in

the United States, where title deeds are of much less importance. In several American jurisdictions, it is felt to conflict with the systems of registration and in others, with the Statutes of Frauds.

While it is not necessary that all the title deeds be deposited, no equitable mortgage is created unless material evidences of title be included in the deposit.[16] The deposit may secure future as well as past advances, and in this respect the method is superior to the legal mortgage. A court of equity does not look on the legal title as having passed but treats the transaction as a contract by the mortgagor, that his interest in the land embraced in the deeds shall be liable for the debt. Viewed as a contract, the law of the place of deposit must govern and determine the effect of the deposit, though it is an elementary principle of conflict of laws that the creation of interests in immovable property is to be governed by the law of its situs. Thus, a deposit of deeds in England will be governed by English law, though the land embraced in them is in Scotland. There are usually no title deeds to personal property.

20. **Agreement to give a legal mortgage.**—It is a general principle of law that where damages recoverable in a law court for breach of a contract are inadequate, equity will if possible enforce a specific performance of the contractual obligation. It is on this principle that a written agreement to mortgage either realty or personalty is, by the weight of authority, specifically enforcible in equity, and as a short cut to the ultimate enforcement of the mort-

[16] Lacon v. Allen, 3 Drewry 579 (Eng.), LEADING ILLUSTRATIVE CASES.

gage, a court of equity will give to the agreement itself the effect of creating an equitable mortgage. This is usually explained by saying that equity regards that as done which ought to be done, but it is submitted that the above is a more accurate analysis of the action taken by the equity court. It is impossible to estimate with accuracy the exact damage to the intended mortgagee as a result of his not having security—though his damage is actual in carrying a risk of future loss, the extent of it is problematical. It is therefore immaterial whether personalty or realty is to be mortgaged. The agreement must be in writing or sufficiently performed to take the case out of the Statute of Frauds.

The property which the owner agrees to mortgage must be described or referred to sufficiently clearly to enable a court to identify it, else no lien will attach. But in Payne v. Wilson,[17] an agreement to mortgage one of several houses which were being erected at the time was held a good equitable mortgage, though no particular house was specified. It would be dangerous to extend the doctrine of that case, and it would seem that in equity, as at law, no interest in property should be created unless the property is specified.[18]

A case may be imagined where protection to the creditor would demand that the agreement to give a legal mortgage should be specifically performed. If the creditor pursues his remedy before the maturity of the obligation, he should ask to have the

[17] 74 N. Y. 348, LEADING ILLUSTRATIVE CASES.
[18] Williams v. Lucas, 2 Cox 160 (Eng.).

debtor ordered to execute a legal mortgage, and to protect him against purchasers without notice a court of equity will grant his petition. The agreement may expressly provide for a mortgage, or it may provide for an absolute conveyance—both cases will be treated similarly if the object of the agreement be to provide security to the creditor. To be enforcible specifically, an agreement to give a legal mortgage should be in writing. But under some circumstances it may be enforced in equity though parol. Where A was owner of land subject to a mortgage and borrowed money from B for paying it off, promising orally to give B a mortgage, it was held that B's performance of his part of the contract was enough to take it out of the Statute of Frauds. A's refusal to execute the mortgage as agreed was said to be a fraud on B against which the equity court relieved.[19]

21. **Agreements to satisfy obligations out of specified property.**—Where the debtor stops short of executing a legal mortgage, or an instrument intended to operate as a legal mortgage, his agreement more often takes the form of an undertaking to satisfy the creditor out of certain property. Here no legal mortgage is intended and under no circumstances would a court of equity be justified in decreeing the execution of one. But that is no reason for refusing to subject the property to the security lien of the creditor, in accordance with the intention indicated in the agreement. Here the extent of the lien is to be judged not by the extent of the obligation, but

[19] Baker v. Baker, 2 S. D. 261, 49 N. W. 1064.

by the terms of the actual agreement. The doctrine is well stated by Pomeroy, as follows: "Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice. * * * The doctrine is clearly an application of the maxim, 'Equity regards as done that which ought to be done.'"[20] It amounts to specific performance of the contract.

This effect is given to an agreement that the creditor shall have a lien on certain property. Such an agreement must be in writing if the property is land. Where the owner of land agrees that a creditor may hold it until the debt is paid, it is an equitable mortgage. Likewise an agreement to pay the debt out of the proceeds of certain property—but in this last case, the terms of the agreement negative an intention to create a lien on the property, and a purchaser even with notice would take free of the mortgage lien.[21] Yet if a purchaser knew at the time of paying that the proceeds were to be misapplied by the seller, he would not be justified in paying without first tak-

[20] Pomeroy, Equity Jurisprudence, § 1235.

[21] Britt v. Harrell, 105 N. C. 10, LEADING ILLUSTRATIVE CASES.

ing such steps as would enable the creditor of the seller to prevent the misapplication.

The debtor may confer upon the creditor a power of attorney to sell and convey specific real property in the event that the debt is not paid within a certain time. Such a transaction will be treated in equity as a mortgage of the property covered by the power of attorney.[22]

22. **Perfection of defective mortgages.**—Where a mistake is made in the execution of an instrument which was intended to operate as a legal mortgage or a deed of trust of property, a court of equity will give it the effect of creating an equitable charge. This is a similar jurisdiction to that exercised by courts of equity in the reformation of deeds and other instruments, but it is not so limited. Where a formal defect in a deed, such as the omission of operative words of conveyance, prevents the passing of a title, a court of equity will not reform it unless the agreement of the parties justifies a decree of specific performance. But such a defect in a legal mortgage will always be relieved against by equity's treating the transaction as an equitable mortgage. So where a deed of trust failed to state the name of the trustee, it was treated as an equitable mortgage.[23] Defects in execution, such as the omission of a seal where it is necessary or the failure of an acknowledgment to conform to the statute requiring it, are similarly cured. If necessary to complete relief, a court of equity may order the reformation of a

[22] Reed v. Welsh, 11 Bush 450 (Ky.).
[23] McQuie v. Peay, 58 Mo. 56.

document where the defect is due to a mutual mistake of the parties—in which event it will operate, if so intended, as a legal mortgage.

23. **Mortgage of equitable interest.**—In one case an equitable mortgage is in all respects like a legal mortgage except that it is to be enforced in a court of equity instead of a court of law. A having the legal title to property, holds it in trust for B. Though in reality B has but a personal right to force A to deal with the property for his benefit, this right is generally spoken of and treated as a property interest, and the court of equity will for most purposes treat B as owner. B may therefore mortgage his equitable interest to C—it is a true case of equitable mortgage, and C will occupy in a court of equity a position substantially similar to that which he would have occupied in a court of law if B had been legal owner.

In a title jurisdiction, it is clear that every junior mortgage must operate as this kind of an equitable mortgage. The legal title being in the senior mortgagee, the interest of the mortgagor as a result of his equity of redemption is an equitable interest which he may in equity mortgage to a junior mortgagee. Similarly, a vendee who has a right to specific performance of his contract is treated as the owner of the property to be transferred, in equity, and his interest may be mortgaged. His assignment of his contract for a conveyance will, if shown to have been made for securing a debt, be treated as an equitable mortgage. A cestui que trust, the beneficiary of an ordinary trust, may transfer his interest

by way of equitable mortgage and it will be so treated though the transfer purports to be a conveyance in legal form, if for security.

A court of equity should extend to such an equitable mortgagee remedies similar to those of a legal mortgagee in a court of law. An equitable foreclosure should therefore be permitted.

24. **Analogous situations.**—Certain transactions in which courts of equity restrict legal owners to enjoyment for security only are not to be confused with equitable mortgages. If A agrees to convey land to B, who agrees to pay therefor a stated price, A will thereafter hold the land subject to B's right to a specific performance of the contract to convey, which right B may enforce in a court of equity. In a sense, the land is held as security for B's performance of his agreement to pay the price. But it is in no sense a mortgage, and B's enforcement of specific performance by A is in no sense a redemption. When A seeks a specific performance of the contract it is really an action by him to foreclose B's rights.

The situation is even clearer when A dies prior to the conveyance. His heir will take the title subject to B's right to compel a conveyance, though the interest in the purchase price devolves on the executor or administrator of A.

CHAPTER IV.

THE MORTGAGE DISTINGUISHED FROM OTHER TRANSACTIONS.

25. **Absolute conveyances.**—There is nothing to prevent a debtor's conveying property to his creditor in satisfaction of his debt.[24] But frequently conveyances absolute in form and disclosing no intention to make the grantee a mortgagee, are in fact made for the purpose of securing obligations, and in such cases courts of equity will carry out the real intention of the parties. If by mistake a defeasance clause has been omitted from the deed, the grantor's remedy is to have the deed reformed in a court of equity. More often, the instrument is executed as planned, and purports to be an absolute conveyance. But if the relation of debtor and creditor existed and if both parties actually intended a transfer for security only, the grantor may treat the transaction as though its mortgage nature were expressed in terms.

At first sight, this would seem to be a variance of the written instrument by parol evidence and a violation of the general rule of law, often called a rule of evidence, forbidding such variance. But in reality the equity court takes the instrument as it stands, finds the grantee invested with a title which it is unconscionable for him to assert except for security

[24] Turner v. Kerr, 44 Mo. 429.

purposes, and imposes on him a duty consistent with the mortgage intent, to prevent his unjust enrichment. Even in a lien jurisdiction, therefore, the grantee must be treated as having the legal title.

It is impossible to lay down a rule for determining whether security only was intended. Numerous circumstances are evidential aids, but to overcome the presumption that the instrument is what it purports to be on its face and to establish its character as a mortgage, the evidence must be clear, unequivocal and convincing. Its character must be determined as of the time of the conveyance—once absolute, it is always so; once a mortgage, always a mortgage. An extreme disparity between the value of the property and the amount paid by the transferee is evidence of a mortgage. Thus in a recent Kentucky case,[25] only $407 was advanced and land worth $9,000 was conveyed. On the other hand, where the disparity is not extreme, the surrendering of evidence of the debt, such as a note, at the time of the conveyance, is strong evidence that no mortgage was intended. If no debt or obligation exists, security is impossible.

26. **Conditional sales.**—The ordinary case of a conditional sale of chattels presents a situation which differs from that of a mortgage in little more than name.[26] The seller hands over the chattel to the buyer, but according to the terms of their agreement the title is to remain in the seller until the buyer

[25] Oberdorfer v. White, 78 S. W. 436 (Ky.), LEADING ILLUSTRATIVE CASES.

[26] Williston, Sales, p. 529.

pays the purchase price. "Such a transaction is in its essence analogous to a transfer of a title to the buyer and a mortgage back by the buyer to the seller in order to secure the price."[27] The seller is usually treated as though he were a mortgagee of the chattel and yet he is permitted in most states to enforce stipulations of his contract which in a mortgage a court of equity would entirely disregard. For instance, where A sold machinery to B, retaining the title until the purchase price should be paid, and where A because of B's default seized the goods, he was not forced to account to B for instalments of the price which he had received.[28]

Even if it be a difference chiefly in name, yet the difference between the conditional sale just described and a chattel mortgage is not to be neglected. It is generally held that a statute providing for the recording of chattel mortgages does not cover conditional sales.[29] A slight variation in the wording of a statute might, of course, warrant a different result.

The term "conditional sale" is frequently applied to another transaction which presents some analogy to a mortgage. A, the owner of land, sells it to B and conveys the title, but by the bargain B gives A an option to repurchase the land on certain terms. In spite of the fact that it is frequently difficult to distinguish this "conditional sale" from a mortgage, the two are vastly different, for in the case stated, A has no obligation to repurchase, there is no debt

[27] Williston, Sales, p. 960.

[28] Duke v. Shackleford, 56 Miss. 552, LEADING ILLUSTRATIVE CASES.

[29] Rogers Locomotive Works v. Lewis, 4 Dill. 158 (U. S.). Contra, Talmadge v. Oliver, 14 S. C. 522.

and a fundamental characteristic of a mortgage is wanting.[30] It follows that the seller would lose all rights by a failure to comply with the strict terms of his option.

27. **Pledges of chattels.**—A debtor may secure his creditor by the pledge or pawn of his chattels. The title in this case remains in the debtor, who parts with the possession for this special purpose. The creditor who takes it is a mere bailee with certain possessory rights, and he does not become even at law the complete owner after the debtor has made default. Though he is permitted to realize on his security very much as a mortgagee may realize, the pledgee will never acquire, by the pledge alone, an absolute title.[31]

28. **Liens securing debts.**—Under various conditions, liens are created on personal property to secure the payments of debts—an innkeeper, for instance, has a lien on his guest's baggage, which will enable him to possess it until the guest's bill is paid. Here the title to the chattel is in the guest, and the innkeeper's security interest is dependent on his retaining possession. A lien is less valuable than a pledge interest because of the inadequacy of the remedies afforded by the common law for enforcement of the security.[32]

29. **Deeds of trust.**—In numerous states, deeds of trust in the nature of mortgages have almost entirely superseded the ordinary mortgage—they are

[30] Conway v. Alexander, 7 Cranch 218 (U S.).
[31] Brown v. Bement, 8 Johns. 96 (N. Y.).
[32] Schouler, Personal Property, p. 292.

distinguished only by the fact that another person than the creditor is selected as grantee and such person holds in trust for the creditor to secure the payment of the debt, and beyond that in trust for the grantor. The tendency is to treat such deeds of trust exactly as mortgages are treated, and this is not changed by the addition of a power of sale. "The chief practical difference between a deed of trust with power of sale and a plain mortgage is that the deed of trust may be foreclosed according to its terms by the trustee without the authority of court, whereas a simple mortgage can be foreclosed only under a decree of court."[33] The trustee is a representative of both grantor and beneficiary, debtor and creditor, and he must act impartially in performing his duties.

The deed of trust in the nature of a mortgage is to be distinguished from a deed of trust which for the trust purposes is unconditional and indefeasible. The latter is an absolute parting with the title, and the grantor has no right to redeem. Whether a conveyance is the one or the other, depends entirely on the terms of the deed.

If A conveys to B in trust for C under conditions where no security is involved, it is the ordinary trust, though a condition may be annexed by which at some future time the estate is to come back to A. If it is to secure a debt which A owes, it is a deed of trust in the nature of a mortgage.

[33] Axman v. Smith, 156 Mo. 286.

CHAPTER V.

ELEMENTS OF THE MORTGAGE.

30. **Who may be mortgagor.**—A mortgagor must have sufficient mental capacity to dispose of his property. The standard is not peculiar to the law of mortgages. Mere weakness of mind does not preclude a person from mortgaging his property, nor does sickness, nor advanced age. It is only necessary that at the time of mortgaging, the mortgagor should be able to comprehend the nature of the transaction. A person cannot mortgage to himself, hence an administrator indebted to his decedent's estate cannot mortgage to himself as administrator.[34] Since sanity is common to most men, the burden of proving the insanity of the mortgagor so as to invalidate the mortgage, is on the person who seeks to avoid the mortgage.

An infant's mortgage, like his deed or contract, is not void but voidable unless it is made for the purpose of securing the necessities of life. Though voidable while he is yet an infant, it ceases to be so if ratified after he becomes of age. Where an infant purchases land and mortgages it to the seller to secure the payment of the purchase price, the contract and the mortgage must stand or fall together and a ratification of one is a ratification of both. In such

[34] Gorham's Admr. v. Meacham's Admr., 63 Vt. 231, 22 Atl. 572. See also Rackliffe v. Seal, 36 Mo. 317.

case, a mere retaining possession of the land after attaining majority, amounts to a ratification. If the infant avoids his mortgage after coming of age, he need not return the consideration received.[35]

At common law, a married woman had no power to contract—her mortgage was therefore void, even though it was intended to secure the purchase price for land conveyed to her. In England, courts of equity have long since greatly enlarged a married woman's control of her separate estate, and the statutes in the United States very generally permit her to dispose of it as though she were a feme sole, except so far as her husband's curtesy (corresponding to her dower in his lands) is involved. Today, therefore, a married woman may mortgage her separate estate, and this may be done to secure a debt of a third person.

One of two tenants in common can mortgage only his undivided interest in the common property. But partnership assets may be mortgaged by one partner to secure a partnership debt. A corporation with power to hold and convey lands may mortgage them, but the ordinary power of attorney to sell and convey lands does not include a power to mortgage them.

31. **Who may be mortgagee.**—Any person who is capable of holding the property in question may, as a general rule, become mortgagee of such property. It is not necessary that he should have a power to contract. Married women and infants could be mortgagees from very early times. Several persons as joint mortgagees will hold according to the rules

[35] Scott v. Brown, 106 Ala. 604, 17 So. 731.

governing absolute conveyances to several persons. A partnership cannot as such accept a conveyance, and a mortgage to it will if possible be construed as a mortgage to the individuals who compose it. Any competent person may be selected as trustee in a deed of trust, and he is not disqualified by an interest in the debt secured, nor by the fact that he is not solvent.

32. **The subject of the mortgage.**—Anything which may be considered as property and which as such is assignable or susceptible of being made the subject of a contract is capable of being mortgaged. The interest need not be vested, it need not be a present interest, it need not be legal. A contingent remainder may be the subject of a mortgage wherever it is susceptible of being conveyed. A mere chose in action is as mortgageable as a chose in possession. One having only an equitable interest may mortgage it, and a mortgagee may sub-mortgage his interest in the property mortgaged to him. But a mere expectancy or possibility cannot be made the subject of a mortgage—such is the interest of an heir presumptive in the property of his ancestor. An undivided interest in land, such as that of a tenant in common, may be mortgaged. In any case, the mortgagee will get that interest which was held by the mortgagor.

33. **After-acquired property.**—At common law, it was impossible for a man to transfer or grant any interest in a thing not in existence, or which he did not own. He might agree to transfer it at a future time, but no present transfer could result.

What purported to be a present transfer was therefore void. By the doctrine of estoppel by deed, one who has purported to convey with covenant of warranty will not be permitted to set up an after-acquired title, but this special doctrine has not a broad application.

In equity, a present transfer will be given the effect of a contract to transfer when the property is acquired, and in most states today this contract will be treated as executed. In Massachusetts, it is necessary that the mortgagee should take possession before he is entitled to priority over a judgment creditor,[36] but this is not the prevailing view. Holroyd v. Marshall[37] is a leading case establishing the proposition that an agreement to mortgage personal property subsequently to be acquired gives the mortgagee a lien on the property as soon as it is acquired, and this lien is good against all but purchasers for value without notice. To some extent, this doctrine has been adopted in most American jurisdictions.[38]

It is frequently very desirable to mortgage after-acquired property—railroad mortgages are generally of this character. Whenever the presently owned property must be used in such manner as to materially decrease its value, the owners must mortgage property to be acquired in order to borrow effectively. Thus, the future net earnings of a railroad company are frequently mortgaged to secure its construction bonds. Until the mortgagee takes posses-

[36] Chick v. Nute, 176 Mass. 57.
[37] 10 H. L. Cases 191 (Eng.), LEADING ILLUSTRATIVE CASES.
[38] 19 Harvard Law Review 575.

sion, these earnings are subject to the complete control of the railroad, and after a receiver representing the mortgagees has taken possession, certain running expenses must be paid before the mortgagees can realize.[39]

The doctrine of potential possession has to some extent mollified the common law view of mortgages of after-acquired property. One who owns property is said to have a potential interest in the fruits of it. Thus, the owner of land may mortgage the crops to be grown upon it, even when no crops have been planted, and the owner of sheep may mortgage their wool. But some present right is essential upon which the potential interest in the future thing may be predicated. Similarly, a mortgage of existing property will include, unless a contrary intention be shown, accessions to it—thus, a mortgage of a domestic animal will cover that animal's increase, though made before gestation began.

It is entirely possible that a legally void mortgage of property to be acquired should be ratified by the mortgagor after he gets the property—in which case, the previous act of transfer becomes operative as from the time of ratification. Any act after the acquisition of the property clearly indicating the owner's intention that it should pass by the previous grant, is a sufficient ratification.

34. **Consideration.**—Like other contractual transactions, a mortgage must be supported by a legal consideration—some benefit must come to the mortgagor or some detriment must come to the mort-

[39] Fosdick v. Schall, 99 U. S. 235.

gagee. The consideration need not move directly from the mortgagee to the mortgagor. A money consideration is not necessary, and in general any consideration which will support a conveyance will support a mortgage. Thus, what is often called a consideration of blood and affection, the relationship existing between father and child, will support a mortgage. Where the mortgage is given at the time the debt secured is created, the loan itself is consideration both for the obligation to repay and the mortgage. But the consideration for the mortgage often passes at a prior or subsequent time. An existing debt is good consideration as between the parties, though in many states the mortgagee will not be elevated to the position of a bona fide purchaser unless he surrenders something anew, as by extending the time for payment, or by giving up a security already held. Similarly, the mortgage may be supported by a subsequent consideration, as a mortgage for future credit, which becomes binding only when the credit is extended.

If the consideration for the mortgage is illegal, or in contravention of public policy, it cannot support the mortgage. So, if the debt secured be unenforcible on account of illegality, the mortgage is void—such is a gambling debt.[40]

35. **The debt or obligation secured.**—It is fundamental that no mortgage can exist without a debt or an obligation to which it is incident. If a transaction does not leave or create an obligation, it must be something else than a mortgage. This obligation

[40] Krake v. Alexander, 86 Va. 206, 9 S. E. 991.

should be stated in general terms in the mortgage deed, but in equity a failure to state it is not fatal. The obligation may be one which is contingent or to be performed in the future. It need not be certain in extent—an unliquidated debt such as an open book account may be secured by mortgage. If a note is secured, it need not be set forth in the mortgage instrument with particularity—it may be identified by parol evidence. And though the security purports to be for a note, it may be for the debt where no note exists.[41]

A money debt was once thought to be necessary, but the performance of any contract or agreement or of any legal obligation may now be secured by mortgage. Where A contracted with B to support C during her natural life and to give her a decent burial at her death and to erect a suitable tombstone at her grave, and A conveyed to B certain premises to secure his performance, this conveyance was held to be a mortgage.[42] And, of course, B's recovery for non-performance was not limited to the amount paid to A for his undertaking. A mortgage to secure the fidelity of an agent is similarly valid, and frequently conveyances are made to indemnify mortgagees against loss in consequence of contingent liabilities where no present debt or obligation exists; an example of the latter case is where A is surety for B, whose debt is owed to C; B conveys to A to indemnify him in the event of A's being compelled to pay C.

[41] Lee v. Fletcher, 46 Minn. 49, 48 N. W. 456.

[42] Cook v. Bartholomew, 60 Conn. 24, LEADING ILLUSTRATIVE CASES.

36. **Future advances.**—A person whose dealings with others are to any extent continual may find it convenient to require security of those others for debts contracted or to be contracted. There is no longer doubt as to the validity of mortgages to secure such future debts or advances by the mortgagees. It is not necessary that the mortgagee should agree to make the further advances, nor that their extent should be known or stated at the time of the mortgage, nor that some of the debts secured should have existed at the time of giving the mortgage.

An interesting question arises where A mortgages to B to secure future advances, and later mortgages to C for the same purpose. Knowing of certain advances made by C and covered by his mortgage (C having knowledge at the time of B's mortgage), B makes advances to A. Is B entitled to priority for his advances over those made by C? After some hesitation, the courts have held that he is not so entitled, since he acts voluntarily with full notice of C's action.[43] But if B had obligated himself to make the advance, C would not be given priority in such a case.[44]

Where the mortgage is silent about future advances, it may, nevertheless, cover advances up to the amount which it purports to secure, if such amount is in excess of the debts existing at the time of its execution. And it is not necessary that a particular time should be set for the making of the advances.

[43] Hopkinson v. Rolt, 9 H. L. Cas. 514 (Eng.).
[44] West v. Williams (1898), 1 Chancery 488 (Eng.).

If a mortgagee is forced to pay taxes or special assessments against the mortgaged property, for his own protection, he is entitled to add such amounts to the debt secured. This is not analogous to a future advance, however.

CHAPTER VI.

THE FORM AND EXECUTION OF THE MORTGAGE.

37. **Writing necessary.**—The form of a mortgage of lands should in general correspond to an absolute conveyance of them. By the English Statute of Frauds, enacted in 1676, during the reign of Charles II, no interest in land could be transferred without a writing, with the exception of short leases. This statute has been substantially reënacted in every state in the United States, and no mortgage of lands can, therefore, be made without a writing. A similar statute in every state requires a writing to evidence a sale of or a contract to sell goods, wares and merchandise, with several important exceptions, one of which is that if the buyer take possession no writing is necessary. It is a doubtful question whether mortgages of personal property are within the scope of these statutes. The Maine Court said: "We are not prepared to say that a mortgage comes within the statute."[45] The opinions of the best treatise writers are not unanimous on the point.[46]

It is usual to have all mortgages evidenced by a written instrument, and for purposes of priority dependent on recording, statutes make this indispensable. But the courts of equity have seized upon numerous circumstances in their efforts to escape the hard-

[45] Gleason v. Drew, 9 Greenleaf 79 (Me.).
[46] Williston, Sales, p. 63; Browne, Statute of Frauds (5th ed.), p. 383

ship of a rigorous application of the Statute of Frauds, and held them to be sufficient to validate parol agreements. Thus, a part performance of a contract to convey or mortgage land will make the contract enforcible, though it is not evidenced by any writing. In many states a purchaser's going into possession is sufficient to relieve a contract of the fault of no writing, and, similarly, a parol mortgage ought to be valid if the mortgagee goes into possession. The equity principle is that where a person, in reliance on the contract, has assumed a position to abandon which would mean peculiar or irreparable loss, the agreement should be enforced. It is stated by the New Jersey court as follows: "Where an agreement has been executed or in part performed by the complainant, and the acts done place him in a position which is a fraud upon him unless the agreement is executed, equity will not permit the defendant to protect himself from executing his part of the agreement by pleading that it was not in writing."[47]

38. **Contents of the instrument.**—It has already been seen that courts of equity enforce a security intended by the parties, though the expression of intention be inaccurate and informal. A careful person will strive, however, to have the mortgage instrument free from any defects, and will usually follow established forms in framing it. In a few states, short statutory forms are prescribed. Where this is not the case, it is wise to use forms which have been approved.

The names of the parties should be given accu-

[47] Dean v. Anderson, 34 N. J. Eq. 496.

rately and fully, and their places of residence should be given with particularity. It is not fatal to employ fictitious names, if identification is still possible. The consideration should be set forth, especially where it is apart from the contracting of the debt secured, and the property mortgaged should be accurately described so as to be identifiable. Operative words of grant, such as "convey," "mortgage," "demise," are as necessary to the legal mortgage as to any other conveyance. And the estate of the mortgagee must be limited as in deeds. A mortgage of a fee simple estate in lands must be made to the mortgagee "and his heirs." This limitation is usually the function of the habendum clause. Any covenants may be inserted as bargained for.

The condition of the mortgage should describe with particularity the debt or obligation intended to be secured and should stipulate for the defeasance of the mortgage upon the payment or performance of such debt or obligation. It is usually stated that the transfer is to become void on the happening of this condition, but any expression indicating such an intention is sufficient. The clause of defeasance may be in a separate instrument. The time for the payment of the debt secured should be definitely stated so as to facilitate the determination on a default. It is customary today to provide that the mortgagor may remain in possession until default.

39. **Execution of the mortgage.**—The mortgagor's chief part in the execution of the mortgage is his signing. Any impression is sufficient as a signature if so intended, and it may be made by another

person in the presence and at the direction of the mortgagor. A forged signature can give the instrument no efficacy.

In many states it is still necessary that a conveyance of real estate should bear a seal, and where this is true a mortgage must bear the mortgagor's seal. A seal should follow the signature, and should be something stuck on the instrument with mucilage or paste. The modern tendency is, however, to permit any scroll to act as a seal and the formality has lost much of its solemnity as a result.

40. **Witnesses.**—In most states it is not necessary that a conveyance should be witnessed, and this extends to mortgages. Where they are required by statute, it is usually only as a requisite to such acknowledgment or proof as will entitle the instrument to be recorded. Though witnesses are required, an unattested instrument may be supported in equity.

41. **Acknowledgment.**—No acknowledgment before a notary or other public officer is necessary to give a mortgage efficacy as between the parties. But it is usually required as a condition precedent to recording mortgages, both real and chattel. Such a requirement is for the purpose of insuring the authenticity of the instrument before it is recorded. Many states still require acknowledgments of married women to be taken separate and apart from their husbands'. The acknowledgment need not be made in the state in which the mortgaged property is situated. The certificate of acknowledgment should identify the mortgagor, and should show that he appeared in person before the officer taking the

acknowledgment, to whom he was known or sufficiently identified. It is usual to state in the certificate that the mortgagor "voluntarily" executed the instrument.

42. **Delivery.**—The instrument of mortgage or conveyance has no efficacy prior to its delivery by the mortgagor or grantor or by some person acting under his authority, to the mortgagee or grantee or to some person acting for him. This does not mean that a physical handing over of the document is required. Any act which clearly indicates an intention that it shall be operative as a delivered document is a sufficient delivery.[48] On the other hand, though it is handed over, the instrument is not delivered unless this act was done with an intention that it should be a delivery. Mortgages, as deeds, may be delivered in escrow to some other person than the mortgagee to be given to the latter on the happening of some condition. When the condition happens and the document is handed over, it becomes operative as of the time of the delivery in escrow. The authorities are not uniform as to the effect of recording and filing for record on undelivered documents, but it is usually held that such acts are only prima facie evidence of delivery.

Acceptance by the mortgagee is necessary to complete the delivery to him, but no formal act or expression is necessary to evidence an acceptance, and it will be presumed wherever the mortgage is for his benefit. But it is held that the trustee in a deed of trust in the nature of a mortgage need not accept

[48] Nazro v. Ware, 38 Minn. 443, 38 N. W. 359.

the trust, since there is nothing for him to do until default, when, if he declines, another trustee may be appointed.[49]

43. **Recording the mortgage.**—A mortgage will be valid and effective as between the parties, though it is not recorded, and, being binding on the mortgagor, it is equally so on his administrators, heirs or devisees. The purpose of the recording acts is to charge persons dealing with the property with notice of what the records disclose, and to protect such persons when acting in reliance on the record. As between the mortgagee and subsequent purchasers, or lienors, or mortgagees, or judgment creditors, a record of the mortgage is necessary to the complete protection of the mortgagee, unless such persons had actual notice of the mortgage at the time of their dealing. The mortgagee will, however, have priority over the general creditors of the mortgagor.

A mortgage should be recorded in the county in which the land lies, and, if it lies in more than one county, there should be a record in each. Most states consider the mortgage to be recorded from the time when it is filed for record. To be sufficient as such, a record should give notice with reasonable certainty of the nature of the mortgage conveyance.

The statutes concerning the recording of mortgages vary widely in the different states, and, since it is wholly a matter of statute, it is always wise to read the statute of a particular state before proceeding.

[49] Martin v. Paxson, 66 Mo. 260.

PART II

THE MORTGAGE INTERESTS

CHAPTER VII.

ESTATE OR INTEREST OF THE MORTGAGEE.

44. **Ownership.**—It has been explained in previous chapters that various theories are held as to the effect of the mortgage conveyance in conferring title on the mortgagee. In a general sense, it is not improper to speak of him as owner, for he has most of the legal perquisites of ownership. But this is certainly not the popular understanding of his position, and the consequences of restriction to security enjoyment are so great that a mortgagee seems to occupy a position with reference to the mortgaged property hardly better than a trustee's.

Thus, on the death of the mortgagee, while the legal title or interest descends to his heir or devisee, it cannot be enjoyed by such heir or devisee, but must be held as a dry legal interest to secure to the mortgagee's executor or administrator the performance of the mortgage obligation. All benefit of the mortgage is, therefore, personal to the mortgagee and his successors. The interest of the mortgagee before foreclosure is not subject to levy and sale under execution,[50] though, of course, the chose in action

[50] Blanchard v. Colburn, 16 Mass. 345.

which he owns is not peculiar in this respect. Where it is important to possess the title deeds to mortgaged property, the mortgagee is not entitled to them as against the mortgagor, prior to foreclosure, unless it be a mortgage by deposit of title deeds.

45. **Possession.**—At common law, the mortgagee is entitled to possession of the mortgaged premises, unless the mortgage deed contain a stipulation for possession by the mortgagor until default. He might, therefore, take possession immediately after the mortgage. But in many states the equity view of mortgages has been adopted to such an extent that even in the absence of a stipulation to that effect, the mortgagor is entitled to remain in possession prior to default. The stipulation for possession by the mortgagor may be implied from the nature of the transaction—where A conveys to B, who mortgages to A to secure his (B's) performance of an agreement to support and maintain A, it may fairly be implied that the parties intended B to have possession of the premises in order that he might the more easily support A.[51]

If it is in reality a mortgage, an absolute deed confers no greater rights in respect to possession. It is usually held that neither the trustee nor the trust beneficiary under a deed of trust is entitled to possession against the grantor. After default in the performance of the mortgage obligation, the mortgagee may, of course, take possession, his legal title having become absolute; but even in a title jurisdiction, a court of equity will force him to give

[51] Wales v. Mellen, 1 Gray 512 (Mass.), LEADING ILLUSTRATIVE CASES.

up possession upon a performance of the obligation. In a lien jurisdiction, performance ends the mortgagee's right to possession, though a tender does not have this effect.

Any agreement of the parties with reference to the possession of the mortgaged property ought to be enforced according to their intention, but if land is involved the agreement ought to be in writing. It is usual to have a redemise of the premises by the mortgagee to the mortgagor—this is in reality a lease back to the mortgagor. The statutes in some states supply this and forbid the mortgagee to take possession before default. Possession is now seldom taken by the mortgagee, for it involves such responsibilities that he usually prefers to exercise a power of sale. He can easily close up the situation by a sale.

46. **Actions to recover possession.**—A mortgagee entitled to possession has the owner's usual remedies to recover it. He may maintain ejectment, and no notice need be given in advance. But the mortgagor may defend by showing that the debt has been paid or that it is barred by the Statute of Limitations, even though there has been no formal discharge of the mortgage. The beneficiary of a deed of trust cannot maintain an action to recover possession. And the lien theory of mortgage does not confer on the mortgagee any title which would enable him to recover possession in an action at law. A mortgagee is never entitled to a partition of the mortgaged premises as against the mortgagor. Where A mortgages two lots to B, either of which is just sufficient

to pay the debt, B cannot maintain a partition suit to have one of the lots conveyed to him absolutely.

47. **Mortgagee's use of property.**—Once in possession, the mortgagee has a duty to do nothing inconsistent with his holding for security only. He must keep the premises in such condition that when the mortgagor wishes to redeem they can be turned over in substantially the condition they were in at the time of the mortgagee's taking possession. The mortgagee must, therefore, make necessary repairs, though he need not take steps to avoid the deterioration which follows as a matter of course. If a cyclone has taken the roof off the house, the mortgagee must put on a new one, though he need not rebuild a house destroyed by accidental fire; but there is no obligation to paint the house. The mortgagee is not held to the strict degree of care required of a trustee, nor is it necessary that he handle the property as carefully as he would if it were entirely his own.

The mortgagee must not commit waste, and must account for it if committed. If he leases to a tenant properly selected, the mortgagee will not be liable to the mortgagor for waste committed by such tenant. Improvements may be made by the mortgagee as he pleases, and within limits to be hereafter defined, the mortgagor must compensate him for necessary improvements upon redeeming. It is proper for a mortgagee to lease the mortgaged premises, though, of course, the lessee takes subject to the mortgagor's right to redeem. Leasing is usually wise, for it relieves the mortgagee of the uncertainty

in the measure of his account. Where a mortgagee took possession of a hotel and leased it, the Michigan court held that he could refuse to allow the keeping of a bar for the sale of liquors by the lessee, though this stipulation in the lease resulted in a reduction of the rent.[52]

48. **Liability to account.**—The policy of the law forbids the realization by the mortgagee of any advantage beyond his security interest. In the final adjustment he must, therefore, account to the mortgagor for everything he has received as a result of the transaction and his ultimate profit must not exceed interest on the money loaned. But since his interest was legal, his accountability for profits is entirely of equity's cognizance, and it can only be asserted by one entitled to redeem upon actual redemption.

All rents and profits received by the mortgagee in possession must be accounted for, and will then be applied to reduce the payment necessary to the mortgagor's redemption. If the mortgagee used reasonable care in choosing a tenant, he need account only for what he actually received from the tenant. Therefore, if the tenant has absconded or is insolvent, the mortgagee is not liable to account for the tenant's failure to pay the rent. If the mortgagee is unable to secure a tenant, he must make such use of the premises as will yield the ordinary return on premises of that class. A city lot need not be converted into a turnip patch, but a good farm

[52] Curtiss v. Sheldon, 91 Mich. 390, 51 N. W. 1057, LEADING ILLUSTRATIVE CASES.

to pay the debt, B cannot maintain a partition suit to have one of the lots conveyed to him absolutely.

47. **Mortgagee's use of property.**—Once in possession, the mortgagee has a duty to do nothing inconsistent with his holding for security only. He must keep the premises in such condition that when the mortgagor wishes to redeem they can be turned over in substantially the condition they were in at the time of the mortgagee's taking possession. The mortgagee must, therefore, make necessary repairs, though he need not take steps to avoid the deterioration which follows as a matter of course. If a cyclone has taken the roof off the house, the mortgagee must put on a new one, though he need not rebuild a house destroyed by accidental fire; but there is no obligation to paint the house. The mortgagee is not held to the strict degree of care required of a trustee, nor is it necessary that he handle the property as carefully as he would if it were entirely his own.

The mortgagee must not commit waste, and must account for it if committed. If he leases to a tenant properly selected, the mortgagee will not be liable to the mortgagor for waste committed by such tenant. Improvements may be made by the mortgagee as he pleases, and within limits to be hereafter defined, the mortgagor must compensate him for necessary improvements upon redeeming. It is proper for a mortgagee to lease the mortgaged premises, though, of course, the lessee takes subject to the mortgagor's right to redeem. Leasing is [illegible] wise, for it relieves the mortgagee of th[illegible]

in the measure of his account. Where a mortgagee took possession of a hotel and leased it, the Michigan court held that he could refuse to allow the keeping of a bar for the sale of liquors by the lessee, though this stipulation in the lease resulted in a reduction of the rent.[52]

48. **Liability to account.**—The policy of the law forbids the realization by the mortgagee of any advantage beyond his security interest. In the final adjustment he must, therefore, account to the mortgagor for everything he has received as a result of the transaction and his ultimate profit must not exceed interest on the money loaned. But since his interest was legal, his accountability for profits is entirely of equity's cognizance, and it can only be asserted by one entitled to redeem upon actual redemption.

All rents and profits received by the mortgagee in possession must be accounted for, and will then be applied to reduce the payment necessary to the mortgagor's redemption. If the mortgagee used reasonable care in choosing a tenant, he need account only for what he actually received from the tenant. Therefore, if the tenant has absconded or is insolvent, the mortgagee is not liable to account for the tenant's failure to pay the rent. If the mortgagee is unable to secure a tenant, he must make such use of the premises as will yield the ordinary return on premises of that class. A city lot need not be converted into a turnip patch, but a good farm

[52] Curtiss v. Sheldon, 91 Mich. 390, 51 N. W. 1057, LEADING ILLUSTRATIVE CASES.

must not be permitted to grow up in weeds. He must account to the mortgagor for the actual product of his user. If a farm is operated at a loss, the mortgagee should not be liable for more than he actually receives, so long, of course, as there is no fraud or wilful mismanagement. The decided cases usually put this loss on the mortgagee, however, by holding him to account for the fair rental value of the premises.[53] If there is a profit it should in every case come to the benefit of the mortgagor.

In renting the mortgaged premises, the mortgagee must not put into the lease any stipulations which will reduce the rental value, and, if he does, he must account to the mortgagor for the reduction. But where a brewer took possession and leased, it was held that he need not account for profits received on beer sold to his lessee for retail on the premises.[54] The same result would not be reached if the brewer had retailed his own beer on the premises—he ought then to account for his entire profit, retailer's as well as wholesaler's.

If the mortgagee falsifies his accounts, or fails to keep account of his transactions on the premises, he should be liable in every case for as much as a fair rental value of the premises, though he should actually have operated at a loss.

49. **Annual rents.**—If a mortgagee is in possession and receives in any year rents and profits in excess of the current interest on the mortgage debt, such excess is to be applied in reduction of the prin-

[53] Sanders v. Wilson, 34 Vt. 318.

[54] White v. City of London Brewing Co., 42 Ch. Div. 237 (Eng.).

cipal which will thereafter draw interest.[55] But the converse is not true,—if the rents and profits do not equal the current interest, the difference is not to be added to the principal for drawing of future interest. In other words, there is to be no interest to the mortgagee on interest in arrears.

In the application of this doctrine of annual rents, allowance is to be made for repairs, taxes, and expenses of operation, in computing the total rents and profits in any year. Wherever the mortgagee's receipts exceed his disbursements, the surplus should be applied to the payment of the interest. If the disbursements properly made exceed the receipts, the surplus should be added to the principal of the debt for bearing interest.

50. **Improvements.**—A mortgagee cannot make more difficult the redemption by the mortgagor by making improvements and charging them to the mortgagor when he comes to redeem. Such improvements as are necessary to keep up the premises can be so charged, and such as are necessary to a reasonable operation by the mortgagee. Where A mortgaged a mill to B, who put in improved machinery which was necessary in order to successfully compete with other mills of the same sort, B was held to be entitled to reimbursement.[56] But the holding would have been otherwise if the mill might have successfully competed with others of its class without the new machinery. If, however, the improvements made result in increasing the return to the

[55] Van Vronker v. Eastman, 7 Met. 157 (Mass.).
[56] Wells v. Van Dyke, 109 Pa. St. 330.

mortgagee, the mortgagor should not, on redemption, have the improvements and their entire return to the mortgagee. The latter should be permitted to reimburse himself for making the improvements out of the increase in the return which is directly traceable to them.[57]

Exception to the application of this principle, that the mortgagor must not be improved out of his estate, is generally made in favor of a mortgagee who makes permanent improvements while supposing himself to have become absolute owner at some foreclosure sale. Encouragement by the mortgagor is generally given the same effect. Where the mortgagee is reimbursed for improvements made, he must account for increased rents received from the improved estate.

51. **Other disbursements.**—A mortgagee cannot charge the mortgagor for his trouble in taking care of and renting the mortgaged premises, though he should be reimbursed for such commissions paid to an agent as a prudent owner would have paid. In a few states, notably Massachusetts, the mortgagee is entitled to a commission on rents collected. A mortgagee in possession has a duty to pay the taxes, and such payments may be charged to the mortgagor when the latter seeks to redeem. But if the premises are suffered to be sold for taxes, the mortgagee will not be permitted to gain by purchasing at the tax sale, and he can thereafter recover only the actual amount of the taxes plus interest, not what he pays out at the sale.

[57] Shepard v. Jones, 21 Ch. Div. 469 (Eng.).

The mortgagee has an insurable interest in the premises, but he cannot charge to the mortgagor what he pays out in premiums, for he is considered to have acted for the protection of his own interest. Where a mortgagee pays a prior mortgage or advances money to protect the title against prior incumbrancers, he acts to preserve the interest of the mortgagor as well as his own, and may, therefore, charge such payments to the mortgagor.[58]

Expenses of taking possession, but not counsel fees, may be charged to the mortgagor. Reasonable counsel fees expended in the collection of rents may be charged. Where the mortgagee in possession hired a watchman to preserve the property from destruction, he was permitted to charge the cost to the mortgagor on the latter's redemption.[59]

52. **Rights against lessees.**—It will be shown in the next chapter that the mortgagor in possession need not account to the mortgagee for rents received after the mortgage was executed. It follows that a lessee of the mortgagor may safely pay rent to the mortgagor. If the lease was prior to the mortgage, the mortgagee will occupy the position of assignee to the lessor whenever he wishes to assert his rights—after notice to the lessee, the latter must, therefore, pay rent to the mortgagee, and this is true of rent which may be in arrears at the time of the notice.[60] If the lease is made after the execution of the mortgage, the lessee may be ousted at any time by the

[58] Hughes v. Johnson, 38 Ark. 285.

[59] Johnson v. Hosford, 110 Ind. 572, 10 N. E. 407, LEADING ILLUSTRATIVE CASES.

[60] DeNicols v. Saunders, L. R. 5 C. P. 58 (Eng.).

mortgagee, for, being a tenant of the mortgagor, his right to possession cannot be greater than his lessor's. The mortgagee is in no sense an assignee of the mortgagor as to this lease, even after notice to the lessee. The lessee's liability to the mortgagee is, therefore, limited to payment for use and occupation after notice given.

53. **Joint mortgagees.**—If the debt secured is joint, the estate conveyed to the creditors will also be joint. Except where the statutes giving to joint conveyances the effect of creating tenancies in common expressly except conveyances by way of mortgage, the legal estate in the mortgage will be a tenancy in common and not a joint tenancy. A payment to either of the joint mortgagees will satisfy the mortgage.

54. **Rights of the mortgagee's creditors.**—Before foreclosure by the mortgagee, his creditors cannot seize his interest by a levy of execution or by attachment. Though logically the mortgagee has an interest in property which is not exempt from liability for debts, such proceedings by creditors would embarrass the mortgagor in exercising his right to redeem, and for this reason they are not allowed.[61] The creditors of the mortgagee are not injured, for statutes usually confer on them a power to garnish the debt and the security held by the mortgagee will protect any interest which they may acquire in the obligation secured.

[61] Prout v. Root, 116 Mass. 410, LEADING ILLUSTRATIVE CASES.

CHAPTER VIII.

ESTATE OR INTEREST OF THE MORTGAGOR.

55. **Ownership.**—The various theories of the effect of the mortgage transaction were sufficiently discussed in the introductory chapters. The common law theory takes title out of the mortgagor and puts it into the mortgagee. But this does not mean that the mortgagor is in no sense the owner. As to all persons except the mortgagee, his ownership still persists. Abundant proof of this statement is to be found in the rights which the mortgagor may assert so long as the mortgagee permits him to remain in possession. All legal remedies to recover the land are open to him and the usual incidents of a complete legal title attach to his interest.[62] A wife of a mortgagor has dower, and a husband has curtesy. Even the mortgagor will not be heard to say that the title is not in him, except when the mortgagee is concerned. It is for this reason that a second mortgagee can recover possession from the mortgagor in an action of ejectment.

Prior to the mortgagee's taking possession, but not afterward, the mortgagor may recover possession in ejectment against a stranger who enters without right, and may maintain an action against any wrongdoer who injures the property. Against the mortgagee, the mortgagor can maintain no possessory

[62] Allen v. Kellam, 69 Ala. 442, LEADING ILLUSTRATIVE CASES.

action or action for the disturbance of possession, unless the mortgage expressly confers on the mortgagor the right to possession. If the mortgagee, without taking possession or entering, causes damage to the land or crops of the mortgagor, the latter may maintain an action on the case. Where A mortgaged to B, who erected a dam on other land and thereby caused the mortgaged land to be overflowed, A was permitted to recover for damages caused to his land and crops.[63] If a mortgagee in possession threatens to do permanent injury to the mortgaged premises, he may be restrained in equity at the suit of the mortgagor. So, if a mortgagee were to cut down shade trees, a court of equity would restrain him. Within some limits, the mortgagee may change the premises, but cannot make fundamental changes.

56. **Right to convey.**—The interest of the mortgagor may be freely assigned or conveyed.[64] Though in fact it is but an equity of redemption, any conveyance of it as a legal interest is operative. No arrangement between the mortgagor and his transferee can affect the interests of the mortgagee, though the latter may be put to the additional inconvenience of joining an assignee in his foreclosure suit. Here a difference must be noted between legal and equitable mortgages. A bona fide purchaser of land subject to a legal mortgage cannot have greater rights than the mortgagor, but if property is subject only to an equitable mortgage, the purchaser without notice may hold free and clear of the mortgage.

[63] Great Falls Co. v. Worster, 15 N. H. 412, 445.
[64] Medley v. Elliott, 62 Ill. 532, LEADING ILLUSTRATIVE CASES.

Frequent attempts are made by mortgagors to create incumbrances in the shape of easements which will have precedence over the rights of the mortgagee. But it is not infrequent that statutes provide a method of condemnation by municipalities which enable easements to be taken without joining mortgages.[65] Such statutes would be unconstitutional if they failed to provide for due compensation to mortgagees.

57. **Mortgagor's use of property.**—The mortgagor in possession may use the mortgaged property just as an owner would use it, except that he must do nothing to impair the security of the mortgagee.[66] If it is a farm, he may rent it or till it himself. And until the mortgagee takes possession, all rents and profits belong absolutely to the mortgagor.

Unlike the mortgagee, the mortgagor has no obligation to get a certain return from the mortgaged property, nor to account for it once he has got it. His user may cause a slight depreciation if it is reasonable—a mortgagor in possession of a farm may cut timber for firewood or for repairing fences, and if the ordinary course of good husbandry sanctions it, he might cut a small amount of timber for sale. But any cutting which will seriously impair the mortgagee's security may be prevented by the mortgagee and must be accounted for, if necessary, on foreclosure.

Where the value of the premises greatly exceeds the debt secured, it might seem that the mortgagor

[65] Rector, etc., of Christ P. E. Church v. Mack, 93 N. Y. 488; Boutelle v. Minneapolis, 59 Minn. 493.

[66] Ingell v. Fay, 112 Mass. 451, LEADING ILLUSTRATIVE CASES.

should be permitted to reduce that value so long as he leaves ample property to secure the debt. But he has given the mortgagee a larger security and the latter should not have a new contract made for him. Sufficiency of security beyond a certain point is indeed a subjective matter to the lender, but it is, nevertheless, an important matter to the lender. Some slight modification may well be made of this principle by courts of equity, however, in view of the mortgagee's having full protection in his right to take possession. If, for instance, a farm worth $2,000 is mortgaged to secure a debt of $200, the mortgagee will not suffer practical injury if the mortgagor be permitted to cut $500 worth of timber, or possibly $1,000 worth. In a few states the mortgagee must allege and prove that the land without the timber would not be adequate security for the debt, but this is only to be justified as a result of the lien theory of mortgages.

The mortgagor's right to reduce the mortgagee's security, within the limits above set forth, is not to be extended. He would not under any circumstances be permitted to convey a part of the mortgaged premises on the theory that what remains is adequate security.

58. **Relation to mortgagee.**—The mortgagor who is permitted to remain in possession after condition broken is really tenant at will to the mortgagee. It serves no purpose to attempt to apply to him the various incidents of that relation, however, for the mortgage relationship abolishes many of them.[67] The

[67] Morse v. Stafford, 95 Me. 31, 49 Atl. 45, LEADING ILLUSTRATIVE CASES.

mortgagor does not hold adversely to the mortgagee[68] unless there is a distinct repudiation of the mortgage relationship, and such repudiation of the mortgage must, of course, be known to the mortgagee or be such that the mortgagee ought to know of it. It is, therefore, difficult for the mortgagor to regain his absolute title as a result of the operation of the Statute of Limitations. If the mortgagor permits the property to be sold for the payment of taxes, and purchases it at such a tax sale, he will not be permitted to hold the title so purchased against the claims of the mortgagee.[69] He had a duty to pay the taxes and cannot profit as a result of its non-performance. A purchaser at the tax sale who has colluded with the mortgagor is, of course, in no better position than that in which the mortgagor would have been. If a tax sale yields a surplus, the money will be subject to the mortgagee's claim. So of the proceeds of land taken on eminent domain, but in this latter case the mortgagee must be made a party to the proceedings or he will not be barred, for it would not be "due process of law."

A mortgagor may under some circumstances be estopped to deny his title. The principle of estoppel has no unique application in the law of mortgages, however. Estoppel by deed is as applicable here as to absolute conveyances. Hence, if a mortgage deed contains a covenant of warranty, a title acquired by the mortgagor subsequently to the execution of the mortgage will enure to the benefit of the mortgagee.

[68] Benton Co. v. Czarlinsky, 101 Mo. 275, 14 S. W. 114.
[69] Fuller v. Hodgdon, 25 Me. 243.

The result is not different, though the mortgagor has gone through bankruptcy in the interim.[70]

59. **Relation to strangers.**—It has previously been noted that as to all persons other than the mortgagee, the mortgagor is to be considered owner. He may recover possession from any stranger, and may maintain an action for any injury to the premises committed by a stranger. If a stranger enter and cut timber and carry it away, the mortgagor may maintain trespass or trover or replevin, though of course he will hold what he recovers subject to the security interests of the mortgagee. But a stranger may safely buy from the mortgagor products raised on the premises before the mortgagee asserts his right to possession.

60. **Property subject to execution.**—A mortgagor cannot exempt his property from liability for his debts by mortgaging it. The equity of redemption may be sold on execution after levy by a judgment creditor and the purchaser will succeed to all the rights of the mortgagor. Such a sale does not in any way impair the security of the mortgagee. In a title state, it may seem illogical that execution should issue against the mortgagor's interest—it is in reality an equitable execution. Even though the purpose of the mortgage be to secure the support of the mortgagee by the mortgagor, it has been held that the mortgagor's interest may be sold on execution.[71]

61. **The dower of mortgagor's wife.**—It is another

[70] Bush v. Person, 18 How. 82 (U. S.).

[71] Jenkins v. Green, 22 Kan. 562; Bodwell Granite Co. v. Lane, 83 Me. 168, 21 Atl. 829, LEADING ILLUSTRATIVE CASES.

consequence of the mortgagor's being treated as owner that his wife has a dower interest in his lands after the execution of the mortgage. Where the mortgage is executed after the marriage, the wife's dower interest is of course superior to any interest which the husband alone can confer on the mortgage. In this respect, a mortgage does not differ from other forms of conveyance. If the wife joins in the mortgage deed so as to convey her interest to the mortgagee, she will in the ordinary case stand simply as a surety, and though as to the mortgagee her liability is absolute and primary, to the extent of the dower interest, yet the ultimate burden should be borne by her husband's interest, he being the principal obligor. In other words, as against all persons but the mortgagee, the wife of the mortgagor is entitled to dower even though she has joined in the execution of the mortgage.

Where the mortgage precedes the marriage, the wife of the mortgagor can have a dower only in the equity of redemption.[72] Logically, this interest should not be increased as a result of a redemption unless redemption would be made by the husband himself. If after mortgaging lands to B, A should marry and die, his heirs and widow may redeem from the mortgagee. The personal estate of A should not, as in the ordinary case, be liable for the full debt, but the dower interest should contribute in proportion to its value. Where the purchaser of land has but a momentary seisin as a result of a mortgage given simultaneously with the purchase, to secure the

[72] Titus v. Neilson, 5 Johns. Ch. 452 (N. Y.).

purchase price, it is usually held that the wife of the mortgagor (the purchaser) has no dower.[73] The husband's curtesy in his wife's lands corresponds to the wife's dower in his lands, and the foregoing considerations apply to curtesy as to dower. There are the usual prerequisites that there must have been a marriage followed by the birth of issue capable of inheriting, the death of the wife and seisin of the wife. Her ownership of the equity of redemption satisfies the last requirement of seisin.[74]

62. **Insurance.**—So long as he has an equity of redemption, the mortgagor has an insurable interest in the premises. This is true under any theory of mortgages, for it is not necessary that an insured be owner. The contract of insurance is not an incident to the property—it is a personal agreement for the protection of the insured. The mortgagor's insurable interest is therefore equal to the value of buildings on the land, if it is a real mortgage, though the payment of the debt may absorb the whole of their value.[75]

Unless special circumstances indicate the contrary, insurance effected by the mortgagor will redound only to his benefit. The mortgagee has no claim on the proceeds of the policy, except as one of the creditors of the mortgagor. But the contrary is true if the mortgagor has covenanted to insure—the mortgagee will then have a lien on the proceeds to the extent of his interest in the property, though the mortgagor

[73] Stow v. Tifft, 15 Johns. 458 (N. Y.).

[74] Casborne v. English, 1 Atk. 606 (Eng.).

[75] Insurance Co. v. Stinson, 103 U. S. 25; Columbia Insurance Co. v. Lawrence. 2 Pet. 25 (U. S.).

be named as the payee.[76] The covenant to insure is properly a covenant running with the land, though a distinction is usually made between the single breach of a covenant to insure and the continuing breach of a covenant to keep insured. Insurance may be effected by the mortgagee, and this is not precluded by the fact that the mortgagor has insured. The mortgagee's insurable interest is no greater than the debt, though the proceeds of his policy, in the event of loss, need not be applied to extinguish the debt in the absence of an agreement which puts on the mortgagor liability for the premiums. Such policies frequently contain provision for a subrogation of the insurer to the rights of the mortgagee against the mortgagor. Each of several mortgagees has an insurable interest, and insurance effected by one in no manner affects the interests of the others.

[76] Wheeler v. Insurance Co., 101 U. S. 439.

CHAPTER IX.

ASSIGNMENT OF THE MORTGAGE.

63. **What is a valid assignment?**—The estate of the mortgagee may be freely conveyed and assigned. In a title jurisdiction, the assignment must take the form of a legal conveyance, and it must have the same qualities as an absolute conveyance. The consent of the mortgagor is not necessary unless it is stipulated for in the original mortgage, and the effect of such a stipulation may be overcome by a parol waiver by the mortgagor.

The validity of an assignment is governed by the law of the place where it is made, though the law of the situs of the land is that which governs the mortgage itself. An assignment which is ineffectual at law because of a defect in form, may be binding in equity. A transfer by handing over the mortgage papers will be recognized and enforced as an assignment of the mortgage in a court of equity.[77] As between the parties to the assignment, the assignor and the assignee, a consideration is necessary, any consideration sufficient to support a conveyance being sufficient to support an assignment. But this requirement is not made for the benefit of the mortgagor, and the absence of a consideration is not his concern.[78] The mortgagee need not be in posses-

[77] McMillan v. Craft, 135 Ala. 148, 33 So. 26.

[78] Johnson v. Beard, 93 Ala. 96, 9 So. 535, LEADING ILLUSTRATIVE CASES.

sion at the time of his assignment. The possession of the mortgagor is not so adverse as to prevent the mortgagee from conveying.

64. **Assignment of mortgage without the debt.**—The mortgagee's conveyance of the premises may fail to mention, and therefore to assign, the debt secured. In a strict sense, the mortgage and the debt may be separated in this way. But the effect will be to confer on the grantee a bare legal title which must be held for the owner of the obligation. It is frequently said that the conveyance is entirely nugatory, but so far as common-law rules apply this cannot be true. And a court of equity will scan a situation closely to find that there is an intention that the debt should pass with the mortgaged property.[79]

The notion that the assignment of the mortgage alone is a mere nullity, is due to the decisions in the lien jurisdictions, where it is logical to hold that the mortgage lien and the debt are inseparable. The mortgagee having no estate, his lien is but incident to the debt secured.

65. **Transfer of the debt.**—It is now law in most of the states that choses in action may be freely assigned, the common law rule to the contrary having been abolished by statute or decision. Any assignment of a debt should carry to the assignee whatever protection the assignor had in his ownership of it. The debt being the principal thing in a mortgage transaction, a security held by the mortgagee should pass by his assignment of the debt

[79] Jones v. Gibbons, 9 Vesey 407 (Eng.).

unless the parties stipulate to the contrary. But in a title jurisdiction, this result may be reached only in a court of equity, for the mortgagee could not be divested of his estate by simply assigning the obligation.[80] It is usually held, therefore, that the interest remaining in the mortgagee is held by him in trust for the person to whom he assigns the obligation secured. In a lien jurisdiction, the debt and the lien are so inseparable that the latter must pass with the former.

The situation admits of complication where the debt is evidenced by an instrument wholly separate from the mortgage deed, as where a note or a bond is secured by mortgage. A complete assignment may be accomplished without an indorsement of the note or bond, though regularity would require such indorsement. Where the mortgage is assigned and the note is delivered to the assignee, it cannot be doubted that the debt passes.[81] But the mere delivery of the mortgage deed without the bond or note is no evidence of an intention to transfer the debt. So long as the note remains in the hands of the mortgagee, it may be negotiated to bona fide purchasers for value without notice, and such negotiation will always postpone the assignee of the mortgage though it was intended that the note should pass. An equity in the assignee may thus be good against the mortgagee who is assignor, though not good against other assignees of the note.

[80] Barrett v. Hinkley, 124 Ill. 32, 14 N. E. 863, LEADING ILLUSTRATIVE CASES.

[81] Pease v. Warren, 29 Mich. 9, 18 Am. Rep. 58.

Where several notes secured by one mortgage are assigned at different times to various persons, the assignees should have equal claims against the security. In reaching this result, the Supreme Court of Arkansas said, "The notes are secured by one mortgage, executed for the equal benefit of all. It does not provide that one note shall be preferred to the others, but secures all equally or pro rata. The legal title to the property mortgaged is conveyed and held for the benefit of all. The rights and interests acquired in the property begin with the date of the mortgage, and not from the maturity or assignment of the notes or the time when the cause of action arises. There can be no priority of rights in favor of one against the others, as the mortgage is one. * * * The holders of the notes, therefore, stand *aequile jure* (equal in law), and consequently are entitled to participate ratably in the fund derived from the security, if there be not enough to pay all."[82]

66. **Effect of the assignment.**—The assignment of the mortgage and debt has the effect of putting the assignee into the shoes of the assignor, the mortgagee. The assignee may, therefore, enjoy the mortgaged property and enforce the payment of the debt just as these were possible to the mortgagee. Many states have statutes requiring a record of the assignment of a mortgage. Such record has the effect of giving constructive notice to all persons who deal with the mortgagee with respect to the debt and mortgage. But in the absence of notice, actual or

[82] Penzel v. Brookmire, 51 Ark. 105.

constructive, the mortgagor will be protected if he pays the debt to the mortgagee, and he may thereafter enforce the assignee to reconvey the security. Whenever a record is required and not made, a subsequent assignee who advances value will be preferred to a prior assignee.

After he has assigned, the mortgagee may no longer release the debtor from his obligations under the mortgage and any dealing with the mortgagor to that end is ineffectual.[83] If such a release were effectual for any purpose, the result would be that the mortgagee thereby incurs a liability to the assignee. An assignment of a part of a debt will carry to the assignee, at least in equity, a proportional right to a part of the security. Where several notes are secured by one mortgage, the various assignees of them should share the benefit of the security according to the amounts of the debt evidenced by each. But this rule may be modified by the parties, and the mortgagee in assigning one of the notes may by stipulation give to the assignee the benefit of the entire security.

If a mortgagee should assign the mortgage and a forged note to A, and later assign the true note and a forged mortgage to B, who had no notice of the fraud practiced on A, it is conceived that A should have the benefit of the mortgage security,[84] since he got a legal right to it and the mortgagee, though retaining the legal ownership of the debt, gave up all right to the security.

[83] Hagerman v. Sutton, 91 Mo. 519.
[84] Kernohan v. Durham, 48 Ohio St. 1.

67. **A mortgage of a mortgage.**—There is nothing about the mortgagee's relation to the mortgage debt or the mortgaged property which would preclude him from in turn becoming a mortgagor of his interest. He may convey it as collateral security for a debt of his own, though his act will not be permitted to impair the original mortgagor's interest in any way. The transferee has all of the rights of a mortgagee against his transferor until he conflicts with the original mortgagor's right to redeem and then he must give way, for the act of the first mortgagee cannot affect the rights of the mortgagor.

68. **Equities and defenses.**—The assignee of a mortgage generally takes it subject to all equities which existed in favor of the mortgagor at the time of the assignment.[85] But this is not true of collateral agreements made between the mortgagor and the mortgagee. The mortgage and the debt are not in this sense negotiable, and it makes no difference that the assignee had in fact no notice of the equities, nor that he is a bona fide purchaser for value. If the debt is evidenced by a negotiable instrument, however, the transferee will take it free from any defenses which the maker might have against the payee, and the mortgage will secure the instrument as it is cleansed by the transfer. But this is not true unless he has advanced a consideration or parted with value on the strength of it, and it is usually held that a preëxisting debt is not a good consideration for this purpose. Nor will it be true if the assignment is made after the maturity of the

[85] Missouri Real Estate Syndicate v. Sims, 179 Mo. 679, 78 S. W. 1006.

obligation, for any assignee of a debt which is past due must take it subject to equities.[86]

The same consideration is not to be given to equities of other persons than the mortgagor; if the assignee has no notice and advances consideration, he will take free from any equities which may exist in favor of third persons.[87] These are so-called latent equities, as to which the law puts the purchaser of a mortgage on a footing with purchasers of all other property.

69. **Assignment to the mortgagor.**—It is not possible for a person to have an equitable interest in property to which he has the legal title. The word equitable connotes a personal right against some one else than the owner. Hence it is impossible in any strict sense for the mortgagor to become the assignee of the mortgage, for this would mean its extinguishment. But special circumstances may demand the survival of the mortgage for working out the interests of all persons concerned and wherever this is true, the mortgagor may become assignee. If a mortgagor is one of several, or if he has transferred his equity of redemption, or if he has an interest less than or of different nature from that which was mortgaged, in all of these cases, the assignment to the mortgagor will not result in a merger of the mortgage in his estate. So the husband or the wife of the mortgagor may become owner of the mortgage.[88] If a mortgage once falls into the hands of the mortgagor

[86] Higgins v. McDonald, 17 Cal. 289.
[87] Fairfield v. McArthur, 15 Gray 526 (Mass.).
[88] Skinner v. Hale, 76 Conn. 223.

or the owner of the equity of redemption with the result that a merger extinguishes it, it is not capable of being revitalized by being reissued; any further act to be effective must be good as a wholly new act of mortgage.

CHAPTER X.

TRANSFER BY THE MORTGAGOR.

70. **The mortgagor's right to transfer.**—The mortgagor is to be considered the owner of the mortgaged property to the extent that he may freely convey his interest to whomsoever he pleases, subject to the objection only of general creditors who may in fact be injured. The mortgagee is not concerned with such a conveyance by the mortgagor, for his interest cannot in any way be affected by it. It is unnecessary therefore for the consent of the mortgagee to be secured. But if an absolute title is to be conveyed it will be impossible without the mortgagee's joining. Such effect may be given to his acts, without his actually signing a deed of conveyance. Frequently, the mortgage confers on the mortgagor a right to sell, the mortgagee agreeing to be satisfied out of the proceeds. Such a clause is to be interpreted as conferring an absolute power of sale, and the effect of the exercise of the power will be to pass the mortgagee's title.

Without the concurrence of the mortgagee, the mortgagor cannot create any valid legal interests in any part of the mortgaged property. Where A mortgaged land to B and later attempted to dedicate a portion of it to the public for city streets, it was held that a purchaser at a foreclosure sale would

take free of the dedication.[89] This result ought to be reached though the premises were worth many times the amount of the indebtedness, for the contract of the parties and not the judgment of the court should determine the extent of the mortgagee's security. Wherever a mortgage is of the proceeds of certain property, it is essential that the mortgagor should have a right to sell free of the claims of the mortgagee. But in such case if the purchaser knows, at the time of his purchase, of the mortgagor's intention to misuse the proceeds, he would not be safe in paying to the mortgagor without giving due notice to the mortgagee.

71. **Liabilities of mortgagor after transfer.**—It is fundamental that a person cannot assign his liabilities to another. The mortgagor will continue to be liable to the mortgagee for the mortgage debt, whatever be the terms of his agreement with his transferee or assignee.[90] And his liability is primary so far as the mortgagee is concerned, though the transferee has also assumed a liability. But it is entirely competent for the mortgagee to accept the assignee as the principal obligor and relieve the mortgagor from all liability. It is a question of fact in each case whether the mortgagor has been thus relieved. There must be an actual novation, a new contract, to which the mortgagee and the assignee are parties. But the presence of a novation does not necessarily mean that the mortgagor is relieved. It is possible for

[89] Moore v. Little Rock, 42 Ark. 66.

[90] Wadsworth v. Lyon, 93 N. Y. 201; Anthony Investment Co. v. Law, 62 Kan. 193, 61 Pac. 745, LEADING ILLUSTRATIVE CASES.

both the mortgagor and his assignee to have direct liabilities to the mortgagee.

The mortgagor may incur new liabilities to his transferee. If the conveyance is not made subject to the mortgage, or if allowance is not made for it in the calculation of the purchase price, covenants in the deed may put on the mortgagor a direct duty to the transferee to relieve the property of liability for the mortgage debt.[91] Where A, the mortgagor, conveys to B with the usual covenant against incumbrances, A owes to B a direct duty to pay off the mortgage. It is an obligation to exonerate B, not merely to indemnify him. Strictly such a covenant is broken as soon as it is made, for it is a covenant that the premises are free from incumbrances at the time of the transfer. A covenant of warranty, on the other hand, would not be broken until the mortgagee either actually or constructively proceeds to evict B. Until the ultimate damage is suffered, only nominal damages can be recovered by B from A on the covenant against incumbrances. On a covenant of warranty, the actual damage can be recovered as soon as the covenant is broken.

72. **Liabilities of transferee.**—It is really an equity of redemption which the mortgagor transfers to his purchaser in the ordinary case, and the purchaser thereafter occupies a position very similar to that of the mortgagor. He is bound to hold the premises as security for the mortgagee, and to this end it will be improper for him to do anything which is forbidden to the mortgagor. If the mort-

[91] Bock v. Gallagher, 114 Mass. 28.

gage was not recorded, the purchaser may hold free and clear of any claim of the mortgagee. He is entitled to take advantage of anything which appears of record, as a discharge or payment. On the other hand, the bona fide nature of his position does not relieve him of anything which is recorded, no more than if he had actual notice of it. The purchaser owes the mortgagee a duty to do nothing to impair the security for the debt, and can do nothing to relieve the property of its burden. But in the absence of an agreement for a contrary result, he has no direct personal liability for the debt.[92] Where the purchaser has not assumed the obligation, the mortgagee's rights against him are limited to satisfaction out of the property itself. Between the mortgagor and his purchaser, the ultimate liability depends on the terms of the transfer. If the purchase price has been reduced by the amount of the debt, the mortgagor will be subrogated to the mortgagee's right against the property for any deficiency.

73. **Transfer subject to mortgage.**—Where nothing more than the equity of redemption is intended to be transferred, it is usual for the mortgagor to execute a deed of the property with an express provision that it is subject to the mortgage. This result may be accomplished by a deed without any covenants.[93] It is an arrangement affecting only the mortgagor and the purchaser, and may therefore be modified by them without consulting the mortgagee.[94] Its effect is to put the primary obligation

[92] Patch v. Loring, 17 Pick. 336 (Mass.), LEADING ILLUSTRATIVE CASES.
[93] Atherton v. Toney, 43 Ind. 211.
[94] Swope v. Jordan, 107 Tenn. 166, 64 S. W. 52.

on the property itself, and to the extent that the property is of sufficient value to bear it, the mortgagor becomes really a surety. For any deficiency, however, the mortgagor is sole obligor, and the purchaser has no obligation whatever.

Where A transfers mortgaged property to B, expressly subject to the mortgage, and the property is worth $1,000 while the debt is $1,200, A has a primary obligation of $200, the property is primarily liable for $1,000, and B has no personal liability whatever. B cannot complain if A fails to pay his debt of $1,200, and the mortgagee might even release A entirely without giving up his right to satisfaction out of the property in B's hands. A is not strictly a surety, for he has but a right to indemnity out of the property in B's hands. Yet his position is so nearly that of a surety that any arrangement between the purchaser, B, and the mortgagee, modifying the original contract, would entirely relieve him unless he consents. If, for instance, the mortgagee should give to the purchaser an extension of time for payment, A would be entirely relieved.[95]

74. **Assumption of mortgage by transferee.**—It is entirely competent for the transferee to assume with his vendor to pay the mortgage debt. An agreement to this effect may be spelled out in the mortgage instrument itself, in which case the mere acceptance of the instrument with knowledge of its contents will be sufficient to bind the purchaser.[96] Or it may be contained in a separate instrument which need

[95] Travers v. Dorr, 60 Minn. 173, 62 N. W. 269
[96] Foster v. Atwater, 42 Conn. 244.

not be executed with the formalities of the mortgage deed. In the latter case, the later execution of the mortgage deed does not merge the former instrument. The transferee's assumption of the debt must be supported by some consideration, since it is a contract with the mortgagor, but the same consideration which supports the transfer of the property may also serve this purpose. The assumption of the debt usually results from a deduction of the mortgage debt from the purchase money, though each case must be examined to determine whether anything more than a purchase of the equity of redemption was intended. There are no words of art which are indispensable. The contract is not within the Statute of Frauds and may therefore be verbal. But there must be clear evidence of the transferee's intention to assume in every case.

75. **Liabilities of transferee who assumes.**—After his assumption of the debt, the transferee becomes the primary obligor, as between his grantor and himself, and the mortgagor is in reality a surety. Any dealing between the mortgagee and the transferee, when the former knows of the assumption, will be treated as a dealing with the principal obligor and may have the effect of relieving the mortgagor on the principles of the law of suretyship.[97] But no agreement between the mortgagor and the purchaser can relieve the former of his primary liability to the mortgagee, unless there has been an actual novation. There are really two primary obligors so far as the mortgagee is concerned. If the mortgagor is

[97] Travers v. Dorr, 60 Minn. 173, 62 N. W. 269.

forced to pay, he has his action on the contract of assumption against his transferee, and of course the property transferred is security for his reimbursement. It is usually held that the contract of assumption is one of exoneration, not of indemnity,[98] and the consequence of this theory is that the mortgagor need not wait until he is forced to pay to the mortgagee, but may pursue his action for breach of contract immediately after a breach by the purchaser by failing to pay the mortgage at its maturity or within a reasonable time thereafter.

Though it is a contract to which he is not a party, the mortgagee has a direct action against one who assumes with his mortgagor to pay the mortgage debt. There is little unanimity in the decisions as to the theory by which this result is reached. As a contract for the benefit of a third party the mortgagee ought to be permitted to enforce it. Formerly only courts of equity allowed it; now the action may be maintained in a court of law. It is sometimes said that until the mortgagee in some manner indicates his acceptance of the purchaser as an obligor, the latter may escape liability by an arrangement with the mortgagor. But this neglects the fact that the assumption is in reality a contract in which the mortgagee has an interest which cannot be ignored. The agreement of the purchaser is sometimes treated as a collateral security obtained by the mortgagor which will enure to the benefit of the mortgagee by

[98] Baldwin v. Emery, 89 Me. 496, 36 Atl. 994; Jager v. Vollinger, 174 Mass. 521, 55 N. E. 458. Contra, Blood v. Crew Levick Co., 171 Pa. St. 328, 33 Atl. 344.

equitable subrogation.[99] But this explanation will not justify the actual results of the decisions, and it is better to rest the mortgagee's rights on the principles of contract law as it has been outlined in the foregoing.

If there are successive purchasers of the property and each assumes the mortgage, the last of them will be the ultimate obligor, but all of the others and the mortgagor are sureties and liable to the mortgagee as primary obligors.[1] The liability of one who assumes to pay a mortgage debt is fixed at the time he assumes. It is limited, also, to the liability at the time of the mortgage. If for any reason the debt could not be collected from the mortgagor, it cannot be collected from him. Any part of a mortgage debt may be assumed by a purchaser, and the latter's agreement to pay the interest will not be construed as an agreement to pay the principal also.

76. **Transfer by mortgagor to mortgagee.**—Any stipulation in a mortgage which tends to clog the mortgagor's equity of redemption will be treated as nugatory. But this does not prevent a bona fide conveyance of an equity of redemption to a mortgagee, once it has been validly created. The mortgagee usually holds the upper hand in such transactions, which means that his position is one of power which may easily be abused. For this reason, the courts scrutinize any dealing between the owner of an equity of redemption and the mortgagee with

[99] Crowell v. Currier, 27 N. J. Eq. 152.

[1] Hyde v. Miller, 45 N. Y. App. Div. 396, 60 N. Y. Supp. 974.

eagle eyes, to determine that it is in every respect voluntary and fair.[2] There must be a real consideration, though this does not mean that a new consideration must pass. If the property is not worth more, the equity of redemption may be transferred to the mortgagee in satisfaction of the debt. A release by the mortgagee of part of the premises mortgaged may be good consideration for a conveyance of the equity in the residue. The conveyance should be evidenced by a proper deed, unless the mortgagee's original deed was absolute on its face, in which case any sufficient evidence of intention is proper.

The usual effect of the transfer will be a merger of the interests in the hands of the mortgagee and the complete extinguishment of the equity of redemption. But this will not be true where the protection of any collateral interests or of any junior mortgagees demands a different result, or where for any reason the mortgagor is not entirely barred. A merger will not result contrary to the clear intention of the parties.[3]

77. **Partial transfers.**—The problems which arise where the mortgagor conveys only part of the mortgaged property, or where he conveys several parts to various transferees, do not differ in nature from those which have been discussed above. The mortgagee cannot be deprived of his right to enforce payment against all or any part of the property, and

[2] DeLancey v. Finnegan, 86 Minn. 255, 90 N. W. 387, LEADING ILLUSTRATIVE CASES.

[3] Security T. & Tr. Co. v. Schlender, 190 Ill. 609, 60 N. E. 854.

the mortgagor cannot apportion the liability among the various parts of it.[4] If A, the mortgagor, conveys half of the property to B, and half to C, the mortgagee may proceed against either half, or against both halves at the same time. Having got payment of his debt out of one half, he cannot get a second payment out of the other. But the owner of the first half will have a right to contribution from the owner of the other, and in the ordinary case both must bear the burden equally. If A, himself, kept the second half, the rights of the mortgagee would not be changed, but the presumption would be that the whole loss should fall on what was retained by A, and in that event B might proceed against A for whatever he is forced to pay to the mortgagee. If the mortgagee should release one part, he would be taken to have satisfied himself to the value of that part, and by so much his right to further satisfaction is reduced. An agreement by the mortgagee to apportion the liability among the various parts of the property may be enforced against him.

[4] Bush v. Sherman, 80 Ill. 160.

CHAPTER XI.

ADMINISTRATION OF ESTATES.

78. **On the death of the mortgagor.**—In the very early English law, a debt was considered to be so very personal that no liability on it could survive the death of the debtor, and no benefit could survive the death of the creditor. But the rule has long since been changed to permit the survival of both benefits of and liabilities on all contracts except those of a peculiarly personal nature, such as contracts to marry. The death of the mortgagor does not, therefore, render it impossible for the mortgagee still to have satisfaction from the estate of the mortgagor. In most instances, it is the personal estate of the mortgagor which has been enriched as a result of the contracting of the debt, and it is frequently said to be for this reason that his personal estate is primarily liable for the mortgage debts. The true reason is that the character of the debt is not changed by reason of the security, and like all other debts, the obligation passes to the debtor's executor or administrator, who must satisfy it if possible out of the personal estate.[5] The property itself is not discharged of the security burden, but its owners will in the ordinary case be entitled to exoneration from the executor or administrator.

[5] Seaver v. Lewis, 14 Mass. 83; Plimpton v. Fuller, 11 Allen 139 (Mass.), LEADING ILLUSTRATIVE CASES.

79. **The descent of the equity.**—The fact that property has been mortgaged does not mean that its course of descent on the death of the owner has been changed. Where the mortgagor is conceived to have left only an equity of redemption, equity will follow the law and it will descend as though it were a legal interest. Real property, which has been mortgaged, will therefore still descend to the heir of the intestate owner, or will pass to his devisee if given by his will. So far as such heir or devisee is concerned, the debt is a wholly collateral thing. The property is still liable for the debt, but if such liability is enforced, the owner will be subrogated to the creditor's right against the deceased debtor's personal estate. To prevent the enforcement of such liability, the heir or devisee may enforce a payment by the executor or administrator, if there is sufficient estate for the purpose, and if not he may insist upon an apportionment. This may be varied, however, by the deceased debtor's will. Any expression of his intention that the mortgaged property itself is to bear the ultimate burden, is to be respected. It is frequently a nice question whether a will expresses such an intention. Where, for instance, mortgaged land is devised to A, specific legacies to B, other lands to C, pecuniary legacies to D, and the residuum of personalty and realty to E, what property is to be taken in exoneration of that which was mortgaged? The specific legacies and devises ought not to be taken, for such would be contrary to the intention of the testator that they should pass to the legatees and devisees. The pecu-

niary legatees, also, have a claim as good as that of the devisee of the mortgaged property, if priority between them is to depend on the expressed intention of the testator. But the residuum is necessarily of uncertain amount, and the testator's intention with respect to the property composing it not so definitely expressed. There is less violence to intention, therefore, when the residuum is taken to exonerate the mortgaged property.

80. **Where the mortgage preceded the acquisition.**—Frequently property is acquired which is subject to a mortgage and the mortgage debt is not assumed by the one so acquiring. On the death of the owner, such property will pass to the devisee, but there will be no obligation on the deceased's personal estate to relieve the property of the mortgage burden.[6] The personal estate has not been enriched by reason of the mortgage, but what is more important, the debt did not in any sense become an obligation of the testator and it cannot therefore pass to his executor. If the mortgagee enforces payment out of the devised property, the devisee will get by subrogation whatever rights would have passed to the testator if the foreclosure had been in his lifetime—this would usually be a right to reimbursement from the principal obligor, the original debtor.

One who acquires mortgaged property and assumes to pay the mortgage debt, or who does anything to make the debt his own, thereby comes under an obligation which his executor must bear,

[6] Hoff's Appeal, 24 Pa. St. 200, LEADING ILLUSTRATIVE CASES.

and the result is that the devised property is entitled to exoneration as though the testator had been the original obligor. It is not sufficient that the testator intended to take the obligation on himself. He must have done some act of which such was the actual result. But in both of the cases discussed in this section, it is possible for the testator by any expression of intention in his will to change the result which has been reached. If A buys land subject to a mortgage without assuming the mortgage debt, and devises it to B, he may still direct in his will that B is to have the land free of any burden of the mortgage, and thereby put on his executor a duty to exonerate it.

81. **On the death of the mortgagee.**—The chose in action, or debt, held by the mortgagee is a part of his personal estate and passes, as does his other personalty, to his executor or administrator.[7] Here, too, it was once the rule that no chose in action should survive the owner. But the commercial sense was always opposed to such a rule. A testator may specifically bequeath any debts which are owing to him at the time of his death, and in such cases the right to sue will pass directly to the specific legatee. Or the debt may pass as part of the residuum bequeathed by the will. If the creditor dies without a will, it will pass as all other intestate personalty to the executor. In the hands of any of these persons, the specific legatee, the residuary legatee, or the executor, the debt is secured as it was in the hands of the deceased by the mortgage on

[7] Thornborough v. Baker, 3 Swanst. 628 (Eng.).

the property, and the new owner of the debt may pursue his remedy against the debtor, or against the property mortgaged, or against both.

82. **Descent of the mortgagee's estate.**—The death of the mortgagee has the effect of separating the mortgage debt and the property by which it is secured. The debt will always pass as so much personalty according to the principles outlined in the preceding section. But the mortgaged property has a nature of its own—if personal, it will pass to the executor or legatee; if real, it will pass to the devisee or heir. The case of realty is most illustrative. A, a mortgagee of Blackacre, dies intestate. The mortgage debt will pass to his executor, who alone can collect it and enjoy it for A's next of kin. But the legal title to Blackacre (assuming it to be in a title jurisdiction) will pass to A's heirs at law, who may be very different persons from his next of kin. It is a bare legal title, however, which passes to them and they are in a sense little more than trustees of it. Their position more nearly resembles that of the mortgagor than that of the mortgagee whom they have succeeded. The executor may at any time enforce payment out of the land. A payment by the mortgagor to the executor will completely divest the estate of the heirs. They can in no event have any beneficial enjoyment. If the executor forecloses against the land and there is a surplus, this belongs to the mortgagor. The heirs are really the stakeholders for the executor in the enforcement of his rights against the mortgagor. Their interest is so bare that many courts have fallen into the custom

of saying that the whole of the mortgagee's interest passes to his personal representatives.

There is really no injustice in the way in which these situations are worked out. It should be kept in mind that the positions of both mortgagee and mortgagor are in fact dual—each occupies one position with reference to the obligation, and a wholly collateral position with reference to the property mortgaged. The two relations can be more easily differentiated when different parties have succeeded to them.

PART III

THE MORTGAGE DISCHARGE

CHAPTER XII.

PAYMENT OF THE DEBT.

83. **The stipulation of the mortgage.**—It is always well to have the mortgage stipulate concerning payment with particularity. As said by Littleton:[8]

"And therefore it will be a good and sure thing for him that will make such feoffment in morgage, to appoint an especial place where the money shall be payd, and the more speciall that it bee put, the better it is for the feoffor. As if A. infeoffe B. to have to him and to his heires, upon such condition that if A. pay to B. on the Feast of Saint Michael the Arch-Angell next comming, in the cathedrall church of St. Paul's in London, within foure houres next before the hour of noone of the same Feast, at the Rood loft of the Rood of the North doore within the same church, or at the tombe of Saint Erkenwald, or at the doore of such a chappell, or at such a pillar, within the same church, that then it shall be lawfull to the aforesaid A. and his heires to enter, &c., in this case he needeth not to seek the feoffee in an other place, nor to bee in any other place, but in the place comprised in the indenture,

[8] § 342.

nor to bee there longer than the time specified in the same indenture, to tender or pay the money to the feoffee."

The strictness with which the common law looked for the performance of conditions made it necessary not only that the stipulation be exact, but also that it be complied with exactly.

84. **What constitutes payment.**—There must be an actual satisfaction of the debt in order to constitute a payment. This does not mean that the debt must be paid in actual money. Anything which is accepted by the mortgagee as payment will be sufficient. The acceptance of a check will not amount to a payment unless the check is duly paid. Chattels or any property may be taken by the mortgagee as payment. A debt owed by the mortgagee to the mortgagor may be allowed by the mortgagee to satisfy the mortgage debt, but there must be an actual agreement to this effect. In the absence of such agreement, the mortgagor will not be permitted to set off his claim against his debt.[9] A new note may be given in payment of an old one, or of the mortgage debt. Whether this has been done, depends entirely on the agreement of the parties made when the new note is accepted. If the mortgagee takes the new note as payment, the old debt is gone and it is revived when there is default in meeting the obligations on the new note.

Stipulations contained in the mortgage must be permitted to govern the manner of payment. Thus

[9] Brown v. Coriell, 50 N. J. Eq. 753, 26 Atl. 915, LEADING ILLUSTRATIVE CASES.

where a mortgage stated that the debt was to be paid in "gold coin of the United States," the court enforced such payment though other kinds of legal tender were in circulation.[10] A stipulation for payment in "lawful money of the United States" will be satisfied by payment in any lawful money current at the time.

When a mortgagee pursues his action on the debt and recovers judgment, though the debt is considered to be merged in the judgment, this does not amount to payment, and nothing short of actual payment or satisfaction of the judgment will have that effect.

85. **To whom payment should be made.**—The mortgagor should pay the debt to the mortgagee or to some one duly authorized to receive it for him. If the mortgagee is dead, payment should be made to his executor or administrator, not to his heir. Where there are two executors, a proper payment may be made to either of them. In the lien jurisdictions, the mortgage debt may be garnished as property of the mortgagee and the mortgagor must then pay to the garnishing creditor.[11] If there are several joint mortgagees, payment of the whole debt may be made to any of them. The husband or wife of the mortgagee is not the proper party to receive payment unless specially authorized to do so. Payment should not in the ordinary case be made to the trustee under a deed of trust, but to the person beneficially entitled. Where the mortgagee has as-

[10] Belford v. Woodward, 158 Ill. 122, 41 N. E. 1097.
[11] McGurren v. Garrity, 68 Cal. 566, 9 Pac. 839.

signed and this fact is known to the mortgagor, the latter should pay to the assignee and will not be protected if he pays to the mortgagee. If notice has not been given of the assignment and the mortgagor has no actual knowledge of facts which would put on him a duty to make inquiry, he will be protected from further liability after paying to the mortgagee.

86. **Effect of payment.**—Wherever the stipulation for the payment of the debt is put into the mortgage deed as a common-law condition subsequent defeating the estate conveyed, payment must be made in strict conformity with the stipulation in order to amount to a performance of the condition and defeat the estate. The law courts have always looked with disfavor on such conditions subsequent. But there is greater liberality in equity and any payment accepted by the mortgagee may have the effect of defeating the mortgage. The debt is of course satisfied by the payment, and the mortgage conveyance is entirely defeated. A court of equity will order a reconveyance to the mortgagor if he demands it even if default has occurred.[12] If the payment was in strict conformity with the condition, a reconveyance would not only be unnecessary but inefficacious, for the result is reached automatically. The modern tendency to exalt the debt as the important part of the transaction has led the courts to give to a payment made at any time the automatic effect of revesting the title in the mortgagor. The mortgage loses all virility as a result of the payment and the mortgagee or his lessee no longer has any rights in the

[12] Robinson v. Cross, 22 Conn. 171, LEADING ILLUSTRATIVE CASES.

property. It is not necessary that the mortgage deed be surrendered to the mortgagor, though in a few cases such surrender has given greater efficacy to the payment.[13] If the mortgagee accepts less than the full amount due, not agreeing that it is in lieu of the full amount, it operates only as an extinguishment of so much of the mortgage lien. So a mortgagee runs little risk in this respect.

87. **Premature payment.**—The mortgagee cannot be forced to accept payment of the debt before it is due. He is entitled to have the terms of his contract respected to this extent, and the courts will not make a new contract for him. Mortgages frequently provide that any default in the payment of instalments of the debt shall result in the maturity of the entire amount, but it is held that this provision is only for the benefit of the mortgagee, who may or may not take advantage of it, and that the mortgagor cannot claim any benefit from it.[14] Otherwise, the mortgagor would in many cases profit by his own wrong. It is entirely possible to frame such a provision of which the mortgagor might take advantage. But the inclination of the decisions is against such a construction. If the premature payment is accepted by the mortgagee, he cannot be in a better position than if the payment had been on the proper law day. Though the condition has not in a strict sense been performed, the mortgagor will have a good defense if performance is later demanded. As said by Mr. Justice Holmes, "Payment of the mort-

[13] Decker v. Decker, 64 Neb. 239, 89 N. W. 795.
[14] Watts v. Hoffman, 77 Ill. App. 411.

gage note on the day when it falls due is performance of the promise, and very possibly would discharge the note even as against one who took it for value and without notice later on the same day. But payment before the day, or a satisfaction like that in the present case, is a defense which binds only the party receiving payment and those who stand in his shoes."[15]

Even though a debt is not due, it would seem that a mortgagee might well be forced to accept payment of the principal sum if there is tendered with it all of the interest which will accrue up to the date on which the debt is to become due.[16] In earlier times, the burden of caring for money was so great that the courts very properly hesitated to achieve this result. But it is in accord with the commercial sense of the present time, though it is in effect substituting a new contract for that which was made by the parties.

88. **Proof of payment.**—It is the usual rule that one who alleges the payment of the mortgage debt must prove it. This is true whether he makes the allegation in defense to a suit by the mortgagee to foreclose,[17] or in support of his petition for redemption or for reconveyance. There is no absolute proof required. Parol evidence is admissible for the purpose.

But there are numerous situations in which such proof is unnecessary because of a presumption of payment. It is usually a presumption of fact, not

[15] Watson v. Wyman, 161 Mass. 96, 99, 36 N. E. 692.
[16] Hoyle v. Cazabat, 25 La. Ann. 438.
[17] Crooker v. Crooker, 49 Me. 416.

of law, and unless there are circumstances which base an estoppel it may be rebutted by proof that in fact there was no payment. The presumption arises where the mortgagor has possession of the note secured by the mortgage, or of the mortgage securities,[18] though rebuttal is not difficult in either of these cases. If the person who seeks to enforce a mortgage fails to produce it or some evidence of the debt secured, there arises a prima facie presumption of payment. If the mortgagor has been in undisturbed possession of the mortgaged premises for a period equal to that required for the acquisition of title by adverse possession, and if during such period he has paid no part of the principal and interest and done nothing in recognition of the existing debt, such lapse of time gives rise to a presumption that the debt has been extinguished.[19] This is a principle of almost universal application in the law and there is nothing about the relation of mortgagor and mortgagee to make it exempt. As said by Sir Thomas Plumer:

"The relation of mortgagor and mortgagee is peculiar: in a court of equity the former is considered as owner, and that is the nature of the contract between them; the tacit agreement is, that he is to be the owner if he pays. Then what is to be the effect of one person's continuing for twenty years in possession of the estate of another, who does nothing to make good his title, and to keep alive the

[18] Ormsby v. Barr, 21 Mich. 474.

[19] Wilson v. Albert, 89 Mo. 537, 1 S. W. 209; Trash v. White, 3 Bro. Ch. 289 (Eng.); Bacon v. McIntyre, 8 Met. 87 (Mass.).

relation of mortgagor and mortgagee? The difficulty I feel is, that if twenty years' possession, without claim on the part of the mortgagee, will not operate as a defence against him, I do not see how any period of time, however long, can bar him. If the fiction of a tenancy at will is an answer after any other time, there would be no possibility of stopping. With respect to the mortgagor, it is clear that his equity is shut out by the mortgagee being in possession for twenty years without acknowledgment; then why should this not be reciprocal? Why should it be necessary for the relation to be kept alive in the one case and not in the other? * * *"[20]

Presumption of payment is rebuttable. In this respect the case is different from the ordinary statute of limitations. And courts of equity do not stick blindly to the statutory period in raising the presumption. A shorter time than is required for adverse possession may suffice to give rise to the presumption. In New York it was held that the lapse of eleven years would not give rise to the presumption.[21] The ordinary statute of limitations applying to choses in action may bar the mortgage debt without discharging the mortgage.[22] No presumption of payment results from such barring, however.

There is a presumption that the debt is unpaid where one having title to a mortgage deed or note secured, produces it, and no indication of payment, by indorsement or otherwise, is apparent.[23]

[20] Christophers v. Sparke, 2 Jac. & W. 223 (Eng.).
[21] Jackson v. DeLancy, 11 Johns. 365 (N. Y.).
[22] Chamberlain v. Meeder, 16 N. H. 381.
[23] Shippen v. Whittier, 117 Ill. 282, 7 N. E. 642.

89. **Application of payments.**—A payment to the mortgagee must actually be applied to the mortgage debt before it will have any effect on the mortgage. Where there have been various dealings between the mortgagor and mortgagee resulting in several obligations, it is important to determine which obligation is to be satisfied first. The simple fact that the mortgagee is indebted to the mortgagor will not justify the assumption that the mortgage debt has been satisfied to the extent of the mortgagor's claim against the mortgagee.[24] (Against an assignee of the mortgagee, the mortgagee cannot set it off.) If an actual payment is made to the mortgagee the mortgagor may prescribe the conditions of it and the account to which it shall be applied. Where A sent money to B to pay a mortgage note held by the latter, and B wrote to A saying that it would be applied to the mortgage note if A insisted upon it, but requesting permission to apply it on an open account, it was held that A's failure to reply justified B in applying it to the open account.[25] If the mortgagor in making the payment fails to stipulate that it shall be applied to a certain account, the mortgagee may apply it as he chooses. If, for instance, B holds several mortgages by A, he will naturally apply the payment where the security is least. Unless it may result in injury to a subsequent incumbrancer or to some one else interested in the property, the application may be changed after it is once made, both

[24] McCullars v. Harkness, 113 Ala. 250, 21 So. 472.

[25] Pennsylvania Coal Co. v. Blake, 85 N. Y. 226, LEADING ILLUSTRATIVE CASES.

parties agreeing.[26] If the mortgagee holds several notes and makes no application of the payment, the application will be made by the law in the order of the maturity of the notes. The law will always apply payments to interest due rather than to the principal, if no application is made by the parties.

Where the payment is made from the proceeds of a sale of the property mortgaged, the mortgagee must apply it in satisfaction of the mortgage debt, even in the absence of direction.

[26] McVicar v. Denison, 81 Mich. 348.

CHAPTER XIII.

TENDER OF PAYMENT.

90. **What is a proper tender.**—A proper tender must be made by a person who owes the mortgage debt or by some one who is in some way responsible for its payment. If a purchaser from the mortgagor has assumed the mortgage debt, he is a proper person to make a tender of payment. It would seem that the same ought to be true though he purchased subject to the mortgage, for the mortgagee should have no claim beyond satisfaction of the debt and to save his interest such a person may tender payment of the debt. But it has been intimated that he is limited strictly to redemption.[27] It is just as necessary that the tender be made to some person who is entitled to receive payment. If the mortgagee has assigned, a tender must be made to the assignee; if the fact of the assignment is unknown to the mortgagor, and a payment to the mortgagee would be effectual, then a tender to the mortgagee ought to be as effectual as a tender to the assignee.[28]

The tender must be in accord with the terms of the payment which can be demanded. If the time for payment has passed, not simply the debt and interest but also the costs of the mortgagee must be offered. The full amount due should be offered.

[27] Harris v. Jex, 66 Barb. 232 (N. Y.), LEADING ILLUSTRATIVE CASES. See Jones, Mortgages (6th ed.), § 895.

[28] Hetzell v. Barber, 6 Hun 534 (N. Y.).

Unless objection is made on account of it at the time, a tender of more than the amount due with demand for change is good. The offer of an uncertified check would not be a good tender. If a special place is named in the deed as the place of payment, tender must be made there. After the time for payment has passed, tender should be made to the mortgagee personally; but if the mortgagee is beyond seas or out of the state and has left no one with authority to receive payment, he has obviated the necessity of tender by the mortgagor.[29]

91. **Absolute tender necessary.**—If any condition or contingency be annexed to the tender, it is inefficacious. As said by Mr. Justice Christiancy, "The holder must have understood it at the time to be a present, absolute, and unconditional tender, intended to be in full payment and extinguishment of the mortgage, and not dependent upon his first executing a receipt or discharge, or any other contingency. And the holder must, in every case, have a reasonable opportunity to look over the mortgage and accompanying papers, to calculate and ascertain the amount due; and if such papers are not present, he must be allowed a reasonable time to get them and make the calculation. He cannot be bound under the penalty or at the hazard of losing his entire debt, to carry at all times in his head the precise amount due on any particular day."[30] But the mortgagor in making the tender may demand that the mortgagee do whatever is necessary to his com-

[29] Houbie v. Volkening, 49 How. Pr. 169 (N. Y.).
[30] Potts v. Plaisted, 30 Mich. 149.

plete protection. He may demand, for instance, a release or entry of satisfaction of the mortgage, or proof of the demandant's right to receive payment where another than the mortgagee himself requests it. But it will spoil the tender to annex the condition that a quit claim deed or an assignment of the mortgage be executed by the mortgagee.[31] If personal property has been deposited as security its return may be demanded at the time of the tender. Where diamonds were put up as collateral security, the debtor made a proper tender though he conditioned it on their return.[32]

92. **Tender on the law day.**—It was the common-law rule that the mortgage condition could be as effectually performed by tender as by payment on the law day.[33] Where the strict rules as to conditions prevailed, it was obviously a necessity that the mortgagor should be protected to this extent against the wrong doing of the mortgagee—otherwise, the estate would be entirely lost to him. By refusing the tender, the mortgagee makes it impossible for the mortgagor to perform the condition strictly, and he should not be permitted to profit by what may be termed his own wrong. But the debt survived as a personal obligation of the mortgagor, though he was revested with the estate which had been conveyed to secure it.

93. **Tender before the law day.**—The law of tender is so far dependent on the law of payment that

[31] Dodge v. Brewer, 31 Mich. 227.
[32] Cass v. Higenbotam, 100 N. Y. 248, 3 N. E. 189.
[33] Mitchell v. Roberts, 17 Fed. 776, 5 McCrary 425 (U. S.).

where a payment cannot be enforced, tender will have no effect. Before the law day, the mortgagee has no duty to receive payment from the mortgagor and it would seem that any tender by the latter ought to be of no effect. But it has been explained previously, that if the principal and all interest which might accrue were tendered before the law day, the mortgagee is bound to accept payment. Similarly, a tender ought to be efficacious.[34] Obviously, the mortgagee need not listen to a tender simply of the principal.

94. **Tender after default.**—The strict common-law view of mortgages which once prevailed in England required an actual performance of the terms of the condition, without which the title of the mortgagee became absolute. Where the condition was for payment on the law day, neither tender nor payment after that time could be of any effect. As the view of the courts changed, a later payment at least entitled the mortgagor to a reconveyance, but wherever the title view prevails this effect was not given to a mere tender. In such jurisdictions, "the appropriate office of a tender is to relieve the debtor from subsequently accruing interest, to preserve the right of redemption, or to protect him from the costs of the suit to redeem."[35] A tender does not satisfy or extinguish the ordinary debt, and it cannot have that effect on the mortgage debt.

In the lien jurisdictions, the decisions have departed farther from the ancient common-law rules

[34] Hoyle v. Cazabat, 25 La. Ann. 438.
[35] Jones, Mortgages (6th ed.), § 892.

as to tender. Since the mortgagee has but a lien, he is held to lose it as a result of his wrongful refusal to accept payment of the debt. It is not even necessary that the tender be kept good by the mortgagor's bringing the money into court or keeping it at the mortgagee's demand, in order to extinguish the lien.[86] But where the lien is extinguished, it does not follow that the debt is satisfied. It must be actually paid. And though the lien be extinguished, the mortgagor may be denied the affirmative relief of cancellation of the mortgage unless the tender is kept good or the debt is actually paid. As said by Mr. Justice Rapallo:

"Although the authorities cited sustain the proposition that, when a tender has been duly made of the full amount due, it will discharge the lien, and be a good defence against its enforcement without the tender being kept good, yet we are clearly of opinion that it should be kept good in order to entitle the mortgagor to the affirmative relief which he seeks in this action, and which the judgment awards him, namely, the extinguishment of the mortgage. A party coming into equity for affirmative relief must himself do equity, and this would require that he pay the debt secured by the mortgage and the costs and interest, at least up to the time of the tender. There can be no pretense of any equity in depriving the creditor of his security for his entire debt, by way of penalty for having declined to receive payment when offered. The most that could be equita-

[86] Kortright v. Cady, 21 N. Y. 343, LEADING ILLUSTRATIVE CASES. See also Knollenberg v. Nixon, 171 Mo. 445.

bly claimed would be to relieve the debtor from the payment of interest and costs subsequently accruing, and to entitle him to this relief he should have kept his tender good from the time it was made. If any further advantage is gained by a tender of the mortgage debt, it must rest on strict legal rather than on equitable principles."[37]

95. **Effect of tender.**—The effect of a proper tender is always to stop the running of interest on the debt. This is really a punishment of the mortgagee for his folly in refusing to accept. But it is usually held that the tender must be kept good in order to have this effect. This advantage may be lost by the mortgagor, if, when at a later time a demand is made of him, he should refuse it. If less than the whole amount is tendered, there is no such thing as a pro tanto reduction of interest. The right to interest is considered to be a thing "incidental and accessorial to the debt," and as to all such things the tender is equivalent to payment. The person refusing the tender, furthermore, will be liable for the costs of a later proceeding to foreclose or redeem the mortgage, made necessary by his refusal.

[37] Tuthill v. Morris, 81 N. Y. 94.

PART IV

THE MORTGAGE ENFORCEMENT

CHAPTER XIV.

BY THE MORTGAGOR—REDEMPTION.

96. **Origin of the right to redeem.**—It has already been explained that in early times a failure to pay the debt as agreed resulted in a total loss of his interest in the mortgaged property by the mortgagor. Gradually the courts of equity began to relieve against forfeiture. First, it was in such cases as where the default was the result of accident that they interfered to relieve against the severity of the common law. But by the time of Charles I it was generally recognized in equity that a mortgagor might always redeem, though the law judges continued to oppose the innovation. The result is well stated by Chancellor Kent:

"In ascending to the view of a mortgage in the contemplation of a court of equity, we leave all these technical scruples and difficulties behind us. Not only the original severity of the common law, treating the mortgagor's interest as resting upon the exact performance of a condition, and holding the forfeiture or the breach of a condition to be absolute, by non-payment or tender at the day, is entirely relaxed; but the narrow and precarious character of

the mortgagor at law is changed, under the more enlarged and liberal jurisdiction of the courts of equity. Their influence has reached the courts of law, and the case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules and of the homage which those principles have received by their adoption in the courts of law. Without any prophetic anticipation, we may well say that 'returning justice lifts aloft her scale.' The doctrine, now regarded as a settled principle, was laid down in the reign of Charles I, very cautiously, and with a scrupulousness of opinion. 'The Court conceived, as it was observed in chancery, that the said lease being but a security, and the money paid, though not at the day, the lease ought to be void in equity.' The equity of redemption grew in time to be such a favorite with the courts of equity, and was so highly cherished and protected, that it became a maxim that, 'once a mortgage, always a mortgage.' The object of the rule is to prevent oppression; and contracts made with the mortgagor, to lessen, embarrass, or restrain the right of redemption, are regarded with jealousy, and generally set aside as dangerous agreements, founded in unconscientious advantages assumed over the necessities of the mortgagor. * * *

"The equity doctrine is, that the mortgage is a mere security for the debt, and only a chattel interest, and that until a decree of foreclosure, the mortgagor continues the real owner of the fee. The equity of redemption is considered to be the real and bene-

ficial estate, tantamount to the fee at law; and it is accordingly held to be descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law. The courts of law have, also, by a gradual and almost insensible progress, adopted these equitable views of the subject, which are founded in justice, and accord with the true intent and inherent nature of every such transaction. Except as against the mortgagee, the mortgagor, while in possession, and before foreclosure, is regarded as the real owner, and a freeholder, with the civil and political rights belonging to that character; whereas the mortgagee, notwithstanding the form of the conveyance, has only a chattel interest, and his mortgage is a mere security for a debt. This is the conclusion to be drawn from a view of the English and American authorities."[38]

97. **Stipulations concerning redemption.**—No sooner had the equity of redemption become firmly established than mortgagees began to have inserted in the mortgage instruments stipulations narrowly confining the rights of the mortgagor after default. Attempts were made to restrict the payment to the law day, or to allow but a few days of grace, and after default to have the mortgagor agree not to redeem. Invariably such attempts were futile.[39] Courts of equity zealously guarded against a forfeiture even where the parties had most expressly bargained for it. This is what is meant by the oft-

[38] 4 Kent, Commentaries, p. 158.

[39] Batty v. Snook, 5 Mich. 231, LEADING ILLUSTRATIVE CASES.

repeated phrase, "Once a mortgage, always a mortgage." The principle is well expressed by Pomeroy:

"If the instrument is in its essence a mortgage, the parties cannot by any stipulation, however express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging to a mortgage in equity. The debtor or mortgagor cannot, in the inception of the instrument, as a part of or collateral to its execution, in any manner deprive himself of his equitable right to come in after a default in paying the money at the stipulated time, and to pay the debt and interest, and thereby to redeem the land from the lien and encumbrance of the mortgage; the equitable right of redemption, after a default, if preserved, remains in full force, and will be protected and enforced by a court of equity, no matter what stipulations the parties may have made in the original transaction purporting to cut off this right."[40]

The United States Supreme Court states the principle quite as forcibly: "It is an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has, in a court of equity, a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates."[41] A mortgage may contain the

[40] 3 Pomeroy, Equity Jurisprudence, § 1193.

[41] Peugh v. Davis, 96 U. S. 332, 336, LEADING ILLUSTRATIVE CASES.

most explicit time limit on the mortgagor's right to redeem, and yet it will be disregarded. Time is not of the essence of a mortgage transaction.

A stipulation may be unenforcible as part of a mortgage transaction, and still create a binding contractual obligation. A mortgagee may, therefore, have some relief in contract, but it is impossible to lay down any general rule which will determine whether this is true.

98. **Collateral agreements affecting redemption.** —Not only are stipulations in the mortgage itself of no effect when they restrict redemption by the mortgagor, but that result cannot be accomplished by a collateral or outside agreement. The equity of redemption must not be clogged or fettered. As said by Lord Lindley, "The doctrine, 'Once a mortgage, always a mortgage,' means that no contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the mortgage transaction, or, in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid and is inconsistent with the transaction being a mortgage."[42] But this does not mean that the mortgagee cannot at the time of the loan exact more benefit than will come to him from the payment of the principal and interest. Within limits, some collateral advantages may be demanded.[43] Otherwise, it would be impossible in many cases to get

[42] Samuel v. Jarrah Timber, etc., Corporation, 1904, App. Cas. 323 (Eng.).
[43] Biggs v. Hoddinott, 1898, 2 Chancery Div. 307 (Eng.).

loans. Care must be taken to see that agreements for such advantages do not violate the usury laws, and many courts will scrutinize them closely to this end. Where a mortgagee was a cotton merchant and the mortgagor of cotton agreed in case of default to pay one month's storage, the Alabama Court held that this was an attempt to exact a usurious rate of interest and the agreement was not enforced.[44] But the parties to a mortgage may agree upon certain limitations if these do not tend to restrict unduly the equity of redemption and if the agreement is fair and reasonable. Thus, they may extend the time for the payment of the debt and thereby postpone the time for possible redemption.

99. **Release of equity of redemption.**—Having once determined that a transaction is a mortgage, no contemporaneous agreement by which the mortgagor gives up his right to redeem can be effectual for any purpose. But this does not prevent a later release of the equity of redemption to the mortgagee, if it is made on proper consideration and under circumstances which raise no suspicion of hardship or oppression. The mortgagee has the upper hand and courts will scrutinize a release agreement very carefully to make sure that he has not abused his power. As was said by the United States Supreme Court, "A subsequent release of the equity of redemption may be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. The transaction will,

[44] Uhlfelder & Co. v. Carter's Admr., 64 Ala. 527, LEADING ILLUSTRATIVE CASES.

however, be closely scrutinized so as to prevent any oppression of the debtor. Especially is this necessary, as was said on one occasion by this court, when the creditor has shown himself ready and skilful to take advantage of the necessities of the borrower."[45] The gross inadequacy of the consideration for the release would certainly be one of the circumstances from which oppression would be found. If a release is improperly obtained by the mortgagee, it is no bar to later redemption by the mortgagor.[46]

100. **Who may redeem.**—A person who seeks to redeem the mortgaged premises must have some equitable interest so entitling him. The general rule is that any person who has such an interest as would be injured by a foreclosure may redeem. One who owns an equity in a part of the mortgaged property may redeem the whole, though, of course, as to the other part he will succeed to the position of the mortgagee. The interest should be derived directly from the mortgagor. A wife of a mortgagor, with dower either inchoate or consummate, may redeem the premises so as to protect herself. A purchaser from the mortgagor may redeem; and this is true though the contract of purchase is still executory, if he has a right to specific performance. After the sale of the property, a mortgagor no longer has a right to redeem unless the terms of the sale have reserved the right, as by the purchaser's assumption of the mortgage debt.[47] If the mortgagor is dead,

[45] Peugh v. Davis, 96 U. S. 332, LEADING ILLUSTRATIVE CASES.
[46] Shouler v. Bonander, 80 Mich. 531, 45 N. W. 487.
[47] Noyes v. Hall, 97 U. S. 34.

his heirs or devisees are the proper persons to redeem. Creditors of the mortgagor have no right to redeem unless they have first proceeded directly against the mortgagor's equity. Where there are senior and junior mortgages on the same property, a subsequent mortgagee may redeem from the prior one unless there are special circumstances calling for a continuance of the prior mortgagee's investment.[48]

The mortgagee cannot be forced to submit to the inconvenience of several partial redemptions. It is for this reason that a purchaser of part of the property from the mortgagor may redeem the whole. But where there are several mortgages on the same property, given to a mortgagee to secure different debts, each may be redeemed independently. The parties may by agreement make an apportionment of the mortgage debt so that it will admit of partial redemptions.

At common law a foreclosure by the mortgagee will cut off all right of redemption in persons who are made parties to the foreclosure suit. But the statutes frequently give to the mortgagor an additional period of six months after the foreclosure in which to redeem. This is purely a statutory right and must be distinguished from the ordinary equity of redemption. Being statutory, the terms of the statute must be carefully complied with.

101. **Conditions of redemption.**—The equity of redemption must be exercised on equitable principles. There must be an actual payment or valid tender of all that is fairly due to the mortgagee on

[48] Jones, Mortgages (6th ed.), § 1064.

the mortgage obligation. It is for this reason that a mortgage may bind the property even after the Statute of Limitations has barred an action on the debt itself.[49] If the mortgagee has been forced to pay off a prior incumbrance, the amount paid must be added to the mortgage debt. But the mortgagee cannot demand payment of other debts which the mortgagor may owe him. In England, a mortgagee was formerly permitted to consolidate a number of mortgages against the same mortgagor and demand a redemption of all of them at the same time. But this doctrine of consolidation has never gained much foothold in the United States. The mortgagor must also pay or tender any amounts which the mortgagee has been forced to expend in the protection of the property, as for necessary repairs. If the mortgagee has begun a foreclosure suit, he must be repaid all that he has been forced to expend upon it.

The mortgagor must tender interest from the time the debt was contracted until the time of redemption, deducting any payments made, unless a tender has stopped the running of interest. If a rate of interest is specified, it must be computed at that rate for the whole period. If no rate is specified, the legal rate must prevail, according to the law of the state where the property is situated.[50] Though the mortgagee has proved against the estate of his insolvent debtor and received a dividend on the amount due him, he is still entitled to the payment in full of his obligation.

[49] Rodriguez v. Haynes, 76 Tex. 225, 13 S. W. 296.
[50] Mallory v. Aspinwall, 2 Day 280 (Conn.).

If the mortgage obligation is not a money debt, redemption is still possible wherever the obligation will admit of money measurement. Thus, it has been held that a mortgage for support and maintenance may be redeemed,[51] the computation being according to the standard mortality tables.

102. **Contribution.**—Where a redemption by one person redounds to the benefit of others who have interests in the property, the person so redeeming will usually be entitled to contribution. But this will not be true if the debt was personal to the one who redeems. Where tenants in common are jointly liable for the mortgage debt, the one paying it is entitled to contribution from the other and may enforce his right against the co-tenant's interest in the land.[52] But if it were a debt for which neither tenant is personally liable, there would be no claim to contribution, though the co-tenant's interest in the land might have been foreclosed against and has been relieved of its quasi-liability. The right of contribution cannot be asserted except where the equities of the parties are equal, for it is equitable in its nature. If a mortgagor dies, devising the mortgaged lands to A for life, remainder to B, either A or B may redeem and will be entitled to contribution from the other, the relative value of the estates being computed according to standard mortality tables.

103. **Redemption procedure.**—In some states the statutes create a legal right of redemption. But, in the absence of a statute, the rights cannot be as-

[51] Bryant v. Erskine, 55 Me. 153.
[52] Walker v. Sarven, 41 Fla. 210, 25 So. 885.

serted in a law court, but must be asserted by a bill in equity. The ordinary rules of equity pleading and practice apply, in the absence of statutory modification. The bill should show the debt secured and payable, offer to pay what is admitted or shall be found to be due, pray for an accounting by the mortgagee, ask a reduction of rents and profits if they have been received by the mortgagee, and it should contain a prayer for whatever relief the plaintiff seeks. All persons who are interested in the security or in the equity of redemption should be made parties to the suit, either plaintiff or defendant. If a junior mortgagee seeks to redeem, he should join the mortgagor and all prior mortgagees as parties. If there is necessity for an accounting and probability that complications may arise in making it, the usual practice is to refer it to a master.

The usual decree declares that the plaintiff may redeem on paying the amount due and the costs of the suit, and directs the defendant thereupon to discharge the mortgage and deliver up the property. Some time is usually given to the plaintiff in which to make the payment, the amount being at the discretion of the court. Additional time may be given by the court where special circumstances demand it. The effect of the plaintiff's failure to pay within the time allotted is that the mortgage is foreclosed;[53] the defendant's judgment for costs has the same effect as a decree in a foreclosure suit. That effect is also given to a decree dismissing the plaintiff's bill and giving the defendant his costs.

[53] Stevens v. Miner, 110 Mass. 57.

104. **Bars to redemption.**—Since the mortgagor's right to redeem is equitable and not legal, the Statute of Limitations does not directly apply to it. But courts of equity will apply the Statute by analogy,[54] and if the mortgagee has possessed for twenty years without any recognition of the mortgagor's interests, it is usually held that the right to redemption is barred. No right to redeem arises until after the maturity of the debt, so the twenty years must be computed from that time. If the statutory period is less than twenty years, the analogy holds, and disabilities extending the statutory period are given the same effect in extending the time for redemption. If, for instance, A were an infant 15 years old at the time of the first accrual of the right to redeem, the time allowed him would be extended.

Under some circumstances the mortgagor may be estopped to redeem, as where he conveys the premises to the mortgagee, or acquiesces in the mortgagee's conveyance to a stranger.

105. **Account by mortgagee.**—The general principles governing the mortgagee's liability to account have been discussed in a previous chapter. The account can be demanded by the mortgagor only when he seeks to redeem—his right to an account is an incident of his right to redeem, and, therefore, cognizable in title jurisdictions only in equity. Furthermore, the liability cannot be disassociated from the mortgagee's position as such—if he had entered on the mortgaged premises, not in recognition of the mortgage, but as trespasser, he could not be forced

[54] Barnes v. Boardman, 152 Mass. 391, 25 N. E. 623.

to account, though he would be liable for the trespass. But a mortgagee in possession after default will be presumed to possess as mortgagee.

The right to compel an accounting belongs primarily to the mortgagor, but it may be asserted by any person entitled to redemption. "The junior mortgagee has no right to compel an accounting when the mortgagor has no such right; for it is through the mortgagor, and the equity existing between him and the senior mortgagee, that he is enabled to compel an application of the rents and profits to the satisfaction of the senior mortgagee. For these reasons it is well settled that, in order to charge a mortgagee with rents and profits, it must be shown that he has occupied the mortgaged premises under his mortgage. If the title of the mortgagor has been divested, and the mortgagee has been in possession under a title derived from the mortgagor, he is not chargeable with the rents and profits of the mortgaged premises."[55]

The accounting is in a sense mutual. The mortgagee is not only held for what he has actually received from the mortgaged property—he must be accredited with proper payments made for its protection, such as taxes, insurance premiums, payments to discharge prior mortgages, and cost of necessary repairs and reasonable improvements. The general rule as to improvements is well expressed by Justice Denio:

"Where the conventional relation of mortgagor and mortgagee is shown and acknowledged between

[55] Gaskell v. Viquesney, 122 Ind. 244, 23 N. E. 791.

the parties, there is no reason why the latter should be allowed to obstruct the right of redemption by expending money upon improvements. He can at any time call upon the debtor, by suit of foreclosure, to elect whether he will pay the debt or incur an absolute forfeiture; and if he is found making costly improvements there is good reason to suspect a design to avail himself of the present inability of the debtor to discharge the incumbrance in order to confirm his title to the estate by embarrassing the right of redemption. The general rule is, therefore, understood to be that upon taking the account in a suit for redemption against a mortgagee in possession, he is to be charged with the rents and profits, and be allowed only for necessary reparations."[56]

[56] Mickles v. Dillaye, 17 N. Y. 80.

CHAPTER XV.

BY THE MORTGAGEE—FORECLOSURE BY SUIT.

106. **Origin and nature of the remedy.**—It was an inevitable consequence of the recognition of the mortgagor's right to redeem that a correlative right should be invented for the mortgagee. The transaction had to be closed. He could not forever hold the land subject to an uncertain redemption. As early as the reign of Charles I bills began to be filed by mortgagees asking to be relieved of the mortgagor's equity of redemption.[57] It was a strict foreclosure which was allowed, with the result that the title of the mortgagee became absolute. Thereafter, the mortgagee held as if there had been no condition in his original deed. This strict foreclosure survived until a late day in England, but in this country, except in cases of mortgages to secure the purchase price, it has long since fallen into general disuse.[58] It has been superseded by a much completer and more logical remedy of foreclosure by sale under decree of court. In its new form, therefore, the foreclosure suit is a proceeding to collect the mortgage debt by resorting to the mortgaged property for its satisfaction. It has many of the ear-marks of a proceeding in rem, though it does not lose its character

[57] Spence, Equity Jurisdiction, p. 601.

[58] In one or two states it is still used. Lightcap v. Bradley, 186 Ill. 510, 58 N. E. 221. In some states it was never used. Davis v. Holmes, 55 Mo. 349.

as a personal action against the mortgagor. The mortgagee will never have undue advantage because of the mortgagor's default. The foreclosure by sale carries out the security notion of the mortgage relation, with the result that the mortgagor will have the benefit of any surplus which may remain after the mortgagee is satisfied.

107. **Jurisdiction.**—Bills to foreclose were originally entertained only in courts of equity, but in many states the law courts exercise some jurisdiction to foreclose, usually the result of statute. But the remedies of the mortgagor are cumulative and he may still pursue his equity remedy though the statute permits a foreclosure at law. If a particular court's jurisdiction is limited to cases involving a certain amount, as is that of the Court of Appeals in Missouri, the amount of the debt will determine whether it may entertain a bill to foreclose. If land has been mortgaged, the suit of foreclosure should be brought in the county where the land is, since it is really a proceeding in rem, but the statutes in some states provide for foreclosure at the residence of the mortgagor. But in every case, the suit is so far an action in personam that personal jurisdiction over the mortgagor must be had before it can be entertained. If the property is in two states, as is frequently true where railroads are mortgaged, two foreclosure suits are necessary, for an agent of a court of one state can be given no valid authority to deal with property situated in another jurisdiction.[59]

The foreclosure suit cannot be turned into a trial

[59] Watkins v. Holman's Lessee, 16 Pet. 25 (U. S.).

of questions which are not strictly those arising out of the mortgage relation. As said by the Michigan Court, through Graves, J.: "A court of equity is not the appropriate tribunal, nor is a foreclosure suit a suitable proceeding for the trial of claims to the legal title which are hostile and paramount to the interests and rights and title of both the mortgagor and mortgagee. Such a trial will neither fall in with the nature of the jurisdiction, or the genius or frame of the particular remedy."[60]

108. **Parties to the suit.**—The mortgagee is the person primarily interested in foreclosure, or his assignee, if he has parted with his interest. But if other persons have a direct interest in the suit, they may properly join as plaintiffs. If they refuse to join as plaintiffs, they will not be bound by the decree unless they are joined as defendants, for no one can be made a plaintiff against his will. If the mortgagee has made an absolute assignment, he cannot thereafter prosecute the suit even for the benefit of his assignee.[61] A junior mortgagee may maintain a bill to foreclose his own mortgage, though, of course, the senior mortgagee cannot be adversely affected thereby. The assignee of the mortgagee can in most states prosecute the action in his own name, as a result of the general rule permitting the real party in interest to sue, and this may be true even where his assignment is not in legal form. The assignee of the mortgage note, alone, is generally permitted to foreclose the mortgage, and without joining the

[60] Summers v. Bromley, 28 Mich. 125, LEADING ILLUSTRATIVE CASES.
[61] Barraque & Mason v. Manuel, 7 Ark. 516.

mortgagee as a party. After the death of the mortgagee, his personal representative, and not his heir, is the proper party to sue for foreclosure. The heir cannot maintain the bill, nor need he be joined by the personal representative. If there are joint mortgagees, all of them should join as plaintiffs, but if any refuse, he may be made a defendant by the others; if one dies, the survivors may sue.

All persons who have any interest in the equity of redemption, and who may be affected in any way by the decree of foreclosure, should be joined as parties defendant. A purchaser of the mortgaged estate from the mortgagor is such a person. But if the mortgagor has conveyed his entire interest in the property, he is a necessary party only where personal judgment is sought against him. If the mortgagor is dead, his heirs are indispensable parties. If the wife of the mortgagor joined in the mortgage, she is a necessary party if the decree bars her dower absolutely.[62] Junior mortgagees may be joined as defendants by the senior mortgagee in order that they may be bound by the decree, but they are not necessary parties. If the mortgagor's tenant is in possession of the premises, he may properly be joined as a defendant.

The failure to join any necessary party is, of course, fatal to the plaintiff's bill. A distinction is to be made between parties proper and parties necessary. The failure to join a proper party puts him beyond the reach of the decree, but makes it none the less effective as to those who are actually joined.

[62] Chadbourn v. Johnston, 119 N. C. 282, 25 S. E. 705.

109. **Procedure.**—The bill or complaint need not set out the mortgage word for word, but a copy of it should be filed and incorporated into the bill by reference. The indebtedness of the mortgagor should be clearly stated, though it is unnecessary to file a copy of the mortgage note or bond if only foreclosure is asked. Similarly, the amount due must be stated definitely, or, if it is unliquidated, sufficient facts for computing it. The bill should contain an accurate description of the property against which relief is demanded; in most cases, a sufficient description may be copied from the mortgage itself. It must be shown that the cause of action has accrued either by breach of condition or non-payment of the debt.[63]

The complaint should also state the plaintiff's right to the mortgage and that the interests of each of the defendants are subject to the mortgage, but it need not describe particularly the interest which each defendant claims to have in the property. The prayer for relief is an important part of the bill, and no personal judgment against the mortgagor for the deficiency will be given if the bill does not ask for it. A foreclosure and sale will usually be awarded under a prayer for general relief, if the facts pleaded and proved show it to be proper.[64] The production of a note and the mortgage securing it will make a prima facie case for the complainant. The burden is then on the defendant to prove his special defense.

110. **Defenses.**—It is no defense to the foreclosure suit that the debt secured has been barred by the

[63] Ryan v. Holliday, 110 Cal. 335, 42 Pac. 891.
[64] Hait v. Ensign, 61 Iowa 724, 17 N. W. 163.

Statute of Limitations,[65] or that a judgment has been recovered by the mortgagee on the note or bond secured. The non-maturity of the debt is a good defense, but it is not open to the defendant to complain of breaches of independent covenants contained in the mortgage. If satisfaction of the debt is pleaded, it must be clearly proved; the court will not conjecture from vague indications. If the debt has been overpaid, the mortgagor may file a cross-bill for relief. The validity of the mortgage may be attacked, in defense to a foreclosure, for fraud or duress, or for want of consideration.[66] But if the suit is by an assignee of the mortgagee, it is no defense to the mortgagor that there was no consideration for the assignment. Generally, the same defenses may be made in the foreclosure suit which would be open to the defendant in a suit on the debt or obligation. It is no defense that the mortgagee seeks to foreclose with an improper motive,[67] though relief may be denied because of fraudulent conduct of the mortgagee toward either the mortgagor or junior creditors.

111. **The relief granted.**—The foreclosure decree is really in rem—it is against the thing, rather than the person. There is a judicial finding of the amount due under the mortgage and of the persons liable for it, with an order that if it is not paid within a certain reasonable time set, the property proceeded against shall be sold and the proceeds applied to the pay-

[65] Lewis v. Schwenn, 93 Mo. 26, 2 S. W. 391.

[66] Colt v. McConnell, 116 Ind. 249, 19 N. E. 106; Derrick v. Sams, 98 Ga. 397, 25 S. E. 509.

[67] Trenor v. LeCount, 84 Hun 426 (N. Y.), 32 N. Y. Supp. 412.

ment of the debt. This is to be distinguished from the strict foreclosure which in early times was the corollary of the equity of redemption—in a strict foreclosure, the claims of the mortgagor are extinguished, with the result that the mortgagee's title becomes absolute. If the mortgaged property is plainly more than adequate for the satisfaction of the debt, the decree may direct a sale of only such portion as will satisfy it. It is usually provided that the plaintiff may become a purchaser at the sale, but he may purchase though there is no such provision. A personal judgment against the defendant for the debt, or for such portion of it as is not satisfied out of the proceeds of the sale, is not strictly a part of the foreclosure decree; but, if such relief is asked, the court having taken jurisdiction should proceed to award such relief in a proper case. But the mortgagee is fully protected if this further relief is not given, for he may still proceed in a separate action for the recovery of a personal judgment, and the foreclosure is a defense to such action only in so far as it results in satisfaction of the debt.

The relief in the foreclosure suit must of necessity conform to the pleadings and its scope is limited by the terms of the prayer. But where the prayer is for a strict foreclosure, the courts usually proceed to decree a sale if the case warrants.[68] No attempt should be made in the decree to interfere with the rights of persons not parties to the suit, and if made it will be futile. For the convenience of the mortgagee, in case of strict foreclosure, and of the pur-

[68] Sage v. McLaughlin, 34 Wis. 550.

chaser at the sale in other cases, the decree usually contains a provision for possession of the premises. The amount of debt must be clearly stated in the decree so that further computation by officers of the court will be unnecessary. It may include not merely the principal and interest, but also reimbursement and compensations to which the mortgagee is entitled—such as payments of taxes on the property, insurance premiums paid under agreement with the mortgagor, and costs of the foreclosure proceedings. Charges for which the mortgagee is accountable should be deducted in computing the amount due.

112. **The foreclosure sale.**—The order for the sale of the mortgaged property to satisfy the debt is directed to an officer of the court, usually the sheriff or marshal, and his acts in execution thereof are, in contemplation of law, the acts of the court. For the guidance of such officer, the decree should accurately describe the premises to be sold and spell out with particularity the terms and conditions of the sale. Such details as time and place are usually left to the discretion of the officer working the sale, but he is at all times subject to the supervision of the court itself. It is his duty to conduct the sale in a fair and impartial manner, to the end that the highest possible price may be obtained. Due notice must be given as required by the statutes, which are usually very explicit on this point. Unless there is a special agreement authorizing it, the sale should not be made for credit. The entire property need not be sold at once, unless this is necessary to prevent sacrifice. In some situations, partial sales are

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necessary. Where A, the mortgagor, assigns one-third of the property to B, and later another third to C, equity demands that the parcels be taken in the inverse order of their alienation.[69] That which A still holds will, therefore, be taken first, and then that which was assigned to C. But this rule will not be applied to the prejudice of the mortgagee—his security against the whole property must always be enforcible. The correctness of this rule of inverse order was questioned by Mr. Justice Story as follows:

"As between subsequent purchasers or incumbrancers, each trusting to his own security upon the separate estate mortgaged to him, it is difficult to perceive that either has any superiority of right or equity over the other; on the contrary, there seems strong ground to contend that the original incumbrance or lien ought to be borne ratably between them, according to the relative value of the estates."[70]

The sale is really incomplete until it has been confirmed by the court which orders it, and the court may exercise its discretion in confirming. It is open to any person interested to oppose the confirmation, and if the facts justify it, a resale may be ordered. It is often necessary to direct a resale because of a purchaser's inability to make good his bid. But the same latitude is not allowed to bidders; the successful bidder is bound from the moment when the prop-

[69] Crosby v. Farmers' Bank, 107 Mo. 436, 17 S. W. 1004.

[70] 2 Story, Equity Jurisprudence, § 1233. See National Savings Bank v. Creswell, 100 U. S. 630, LEADING ILLUSTRATIVE CASES.

erty is struck off to him; he becomes, in a sense, a quasi-party to the suit itself and is thereafter subject to the jurisdiction of the court. If another than the mortgagee is purchaser, the master directing the sale executes a deed to him and by its delivery invests him with a title which relates back to the time of the execution of the mortgage. This deed is effective before confirmation of the sale for the purpose of passing at least a voidable title. The purchaser may, if he pleases, have another substituted as grantee. After the deed is delivered to him, the purchaser has the usual remedies for getting possession, if the decree has not dealt with the matter of possession.

113. **Application of proceeds.**—Since the primary object of the sale is the satisfaction of the debt, the proceeds must be so applied in accord with the terms of the decree. First, however, the costs of the suit and sale must be met. Then whatever sum was decreed to be due to the mortgagee, including the principal, interest, taxes, insurance premiums, and moneys necessarily expended to preserve the mortgaged estate, must be paid to him. The surplus remaining represents the value of the equity of redemption and it must be paid into court for distribution to the real owners of the equity of redemption. The mortgagee has no claim on the surplus for satisfying other claims which he may have against the mortgagor, but as to these he must rank as a general creditor. Junior mortgagees are entitled to satisfaction of their claims out of the surplus, if they were parties to the suit; if not, their claims must be proved in

separate proceedings. But if it is a junior mortgage which was foreclosed, the senior mortgagee will ordinarily have no claim to the surplus, for the sale was only of the equity of redemption and his interest remains unaffected. For some purposes, the surplus of the proceeds of a foreclosure sale of land is to be treated as realty. Though the wife joined her husband in the mortgage, she is in equity entitled to dower in the surplus; her dower interest has been extinguished only to the extent that the proceeds were used to satisfy the mortgage debt. If the mortgagor of lands dies before the foreclosure, it would seem that the surplus should be treated as realty and paid to his heirs or devisees, but on this point the decisions are not in accord.[71] A devise of the mortgaged property to pay debts should not make personal assets of the surplus.[72] As said by the court in Wright v. Rose:[73] "If the estate had been sold by the mortgagee in the lifetime of the mortgagor, then the surplus moneys would have been personal estate of the mortgagor and the plaintiffs would have been entitled. But the estate being unsold at the death of the mortgagor, the equity of redemption descended to his heir, and he is now entitled to the surplus produce."

114. **The personal judgment.**—The foreclosure of the mortgage is independent of the personal liability

[71] Johns v. Norris, 22 N. J. Eq. 102; Snow v. Warwick Inst. for Savings, 17 R. I. 66, 20 Atl. 94, LEADING ILLUSTRATIVE CASES, in accord with the text. Curtis v. Moore, 162 Mo. 442, 63 S. W. 80; Brehm v. New York, 104 N. Y. 186, 10 N. E. 158, contra.

[72] Clay v. Willis, 1 B. & C. 364 (Eng.).

[73] 2 S. & S. 323 (Eng.).

for the mortgage debt. A mortgagee may pursue his right to foreclose while action on the debt is pending. Strictly, the foreclosure has no effect on the latter, and a personal judgment for either the whole debt or the deficiency is no part of the mortgage proper. But a court of equity having before it the necessary parties, may properly proceed to give such relief as will entirely clear up the whole situation. So Lord Keeper Nottingham said: "When this court can determine the matter, it shall not be the handmaid to other courts, not beget a suit to be ended elsewhere."[74] Statutes quite generally confer authority to give judgment for the deficiency. Personal judgment against any person other than the mortgagor who may be liable cannot be given in a suit to foreclose the mortgage, in the absence of a statute authorizing it. If judgment is given for the deficiency, it bars any further action on the note secured.[75] The usual practice forbids the rendition of a personal judgment for the deficiency until the foreclosure sale has been concluded and a report made thereon. Of course, any unmatured portion of the mortgage debt cannot be included in such a judgment, and if an action on the debt is barred by the Statute of Limitations, there can be no judgment for the deficiency.[76]

[74] Parker v. Dee, 2 Chancery Cases 200 (Eng.).

[75] Mutual Life Insurance Co. v. Newton, 50 N. J. L. 571, 14 Atl. 756.

[76] Hulbert v. Clark, 57 Hun 558 (N. Y.), 11 N. Y. Supp. 417, LEADING ILLUSTRATIVE CASES.

CHAPTER XVI.

POWER OF SALE MORTGAGES.

115. **Reasons for powers of sale.**—It must have appeared from a reading of the preceding chapter that the mortgagee's remedy is cumbersome and time-consuming, and calculated to put much hardship on the mortgagor in the payment of costs. For these reasons, it is now customary except where it is forbidden by statute to insert in the mortgage deed a provision conferring on the mortgagee himself, or the trustee if it is a deed of trust, a power to sell the mortgaged property upon default by the mortgagor. There was at first some antagonism to such a summary proceeding as a sale by the mortgagee for paying himself. The validity of the powers of sale "was at first much questioned; and when the doubts surrounding their introduction were removed, they were for a considerable time, and are even now in some degree, viewed as a harsh measure. * * * A mortgage of this description is certainly a prompt, powerful security compared with the common mode of mortgaging. * * * The evil of the former mode of mortgaging is, that the mortgagee in proceeding for the recovery of his money, is liable to be delayed for an indefinite time in chancery. The new mode is framed with a view to a settlement out of court."[77] While it is a sort of modification of the mortgagor's equity of redemption, "the guiding

[77] Coventry, Mortgage Practice, p. 150.

principle in reviewing transactions of this nature should be rather to afford facilities for the accomplishment of the intention of the parties, and not to oppose or obstruct that intention by dilatory precautions and impediments."[78] It is now the almost universal view that the owner of property is free to contract for its sale by conferring on the mortgagee a power to sell. The practice of creating such powers of sale has made the mortgage still more similar to the deed of trust. In a sense, the mortgagee with power of sale may be said to act as his own trustee, though strictly that is not possible.

116. **Conditions of exercising the power of sale.** —The power of sale is a cumulative remedy conferred on the mortgagee. He may, in disregard of it, pursue his right to foreclose in a court of equity—the power is often spoken of as a "species of foreclosure." And the remedies are not mutually exclusive—the power may be exercised even after a foreclosure suit has been begun.[79] There can be no exercise, however, until the mortgagor has made default in the payment of the debt, or, if so provided in the creation of the power, of the interest. If the debt has been paid, or if the full amount has been properly tendered, the power is spent and no valid sale can be made under it. But the operation of the Statute of Limitations in barring action on the debt or note secured does not preclude an exercise of the power. Being a power coupled with an interest, it

[78] Pingrey, Mortgages, vol. II, p. 1225. See Turner v. Johnson, 10 Ohio 204; Very v. Russell, 65 N. H. 646, 23 Atl. 522, LEADING ILLUSTRATIVE CASES.

[79] First Nat'l Bank v. Bell S. & C. Mining Co., 8 Mont. 32, 19 Pac. 403.

cannot be revoked by the mortgagor and it may be exercised after his death[80] or insanity or bankruptcy. It is not necessary that the mortgagee should have demanded payment of the debt before exercising the power, and no notice need be given to the mortgagor of his intention to exercise it. Possession of the mortgaged premises by the mortgagee is not necessary, though the right to take possession is expressly conferred.

It is competent for the parties at the time of creating the power to make any desired regulations concerning the sale, and the exercise should strictly conform to such regulations. The motive of the donee of the power is not material in determining his right to exercise it, so long as he pursues only his legal rights, but it cannot be exercised for some other purpose than that for which it was given, namely, to satisfy the debt. Under some circumstances, the exercise may be enjoined; if the mortgagee attempts to use his power to sell for another purpose than that for which it was given, "from any ill motive, to effect means and purposes of his own, or to serve the purposes of other individuals, the court considers that to be what it calls a fraud in the exercise of the power," and will restrain it.[81]

117. **Who may exercise the power.**—Usually the person named as donee of the power is the only one who may exercise it. In the ordinary mortgage, this is the mortgagee; in the deed of trust, the trustee. If conferred on "his heirs, executors, ad-

[80] Beatie v. Butler & Fowler, 21 Mo. 313.
[81] Robertson v. Norris, 4 Jur. (N. S.) 443 (Eng.).

ministrators and assigns," it may be exercised by them in their capacity as such, and a devisee is an "assign" within this use of the term. But there would seem to be good reason in the peculiar nature of mortgage powers of sale to depart from the strict rules governing the exercise of powers and hold that the power is appurtenant to the estate of the mortgagee and that the right to exercise it therefore passes to any assignee as a part of the mortgage security. As said by the Maryland court, "A power of sale conferred by a mortgage upon the mortgagee, being intended to afford him a means of promptly collecting his debt, is a power coupled with an interest, and is therefore appurtenant to the estate, and passes with it as part of the mortgage security to an assignee of the mortgage, or even of the mortgage debt."[82] After the death of the mortgagee, his executor or administrator is the proper person to exercise the power, because of his interest in the mortgage debt.

The person named as trustee in a trust deed has no authority to delegate the exercise of a power of sale conferred on him. A formal acceptance of the trust is not a condition precedent to his exercise of the power. In the event of his death or resignation, a new trustee must be appointed by the court to exercise the power, unless the parties have made provision for appointment of a successor or substitute in some other manner. It is not unusual to provide that the sheriff shall make the sale if the

[82] Maslin v. Marshall, 94 Md. 480, 51 Atl. 85, LEADING ILLUSTRATIVE CASES.

trustee refuses or is disqualified. If there are joint trustees, both should join in making a sale.

118. **The sale.**—The actual sale made in pursuance of the power must conform strictly to the terms in which the power is created. It is usual to provide that notice must be given in advance, but in the absence of such a requirement, the sale may be private, provided reasonable endeavor is made to enlist the interest of prospective purchasers so that the sale will result as beneficially as possible to the mortgagor.[83] But the mortgagee has no duty to hunt up bidders, or to persuade them. The statutes governing foreclosure do not apply. The property may be sold as a whole or in parcels, depending on the facts of the particular case. Under some circumstances, there is a duty to sell in parcels. As stated by the Missouri Court, a mortgagee or trustee "is bound to act in good faith and adopt all reasonable modes of proceeding in order to render the sale the most beneficial to the debtor. Therefore where property will bring more by being separated when sold, it is the duty of the trustee to pursue that course. * * . * No general rule can be laid down."[84] An auctioneer may be employed to cry the sale, but the mortgagee or trustee must be present in person, since conditions may arise calling for the exercise of his discretion. If circumstances call for it, as where a sacrifice and consequent loss to the mortgagor are imminent, the mortgagee has a duty to adjourn the sale to another time.

[83] Carroll v. Hutton, 91 Md. 379, 46 Atl. 967.
[84] In Carter v. Abshire, 48 Mo. 300.

The terms of the sale, whether it shall be for cash or credit, depend upon the stipulations contained in the instrument creating the power. In the absence of such stipulations, it will be taken to have been contemplated that the sale should be for cash, though special circumstances may give the mortgagee or trustee discretion in this respect. It is not unreasonable for the mortgagee to demand cash payment in such a case. If the sale must be for cash, a check should not be accepted unless it is certified. It would seem that since the mortgagor has no interest in that part of the purchase price which will be used for the payment of his debt, he should not be heard to object to any arrangement which the mortgagee might make concerning the payment of so much of the money. If, for instance, A mortgages to B to secure a debt of $500, and the sale of the property by B under a power given to him brings $600, any arrangement by B with the purchaser should be valid for at least five-sixths of the price; and though the terms of the power required a sale for cash, B should be permitted to extend credit to the extent of $500,[85] for to this extent A is not affected.

119. **Who may purchase.**—It is a familiar principle of the law of trusts that the trustee cannot become a purchaser of the trust estate at a sale which he conducts or has a duty to conduct. His relation to the beneficiary is fiduciary, and he must to this extent avoid even "the appearance of evil." In Lord Cranworth's words, "The real reason why a person standing in the relation of trustee cannot

[85] Sawyer v. Campbell, 130 Ill. 186, 22 N. E. 458.

purchase from the cestui que trust is, that he cannot purchase that which he is to sell; he has a duty to perform and of course he cannot purchase, for that would be putting himself in a situation in which his interest would become an interest inconsistent with the duty which he has to perform."[86] Within limits, the principle applies to a sale by a mortgagee or trustee in a deed of trust. His duty to act for the interests of the debtor makes it improper for him to sell to himself, directly or indirectly through an agent.[87] But if the mortgagee purchases at his own sale, he gets a voidable title and if not seasonably disaffirmed by the mortgagor it will eventually become indefeasible. A purchase by a corporation in which the mortgagee is a stockholder is not objectionable, for unless there is fraud the court will not disregard the so-called fiction that the corporation is an entity apart from its shareholders.[88] An assignee of the mortgagee is under the same disability as the mortgagee himself. The disability is at an end once there has been a valid sale of the property, and the mortgagee may buy from the purchaser at such a sale.[89] The courts will scrutinize such a transaction, however, to make sure that it is not in effect an original purchase by the mortgagee. The beneficiary of a deed of trust is under no disability in purchasing at the trustee's sale. His relation to the grantor is in no sense fiduciary. The trustee in making the sale represents both the

[86] Kirkwood v. Thompson, 2 De G. J. & S. 613 (Eng.).
[87] Clark v. Simmons, 150 Mass. 357, 23 N. E. 108.
[88] Farrar v. Farrars, 40 Ch. D. 395 (Eng.), 58 L. J. Ch. 185 (Eng.).
[89] Durden v. Whetstone, 92 Ala. 480, 9 So. 176.

grantor and the beneficiary and any dealing between them is therefore "at arm's length."

It is entirely competent for the parties to provide that the mortgagee may become a purchaser. And if the mortgagee acts on this authority, there is the apparent anomaly of a man's executing a deed to himself. In reality, however, the conveyance is from the mortgagor.[90]

120. **The position of the purchaser.**—The sale itself does not put title into the purchaser—a conveyance is necessary. But the purchaser is entitled to specific performance of his contract and may compel a conveyance. While in reality it is the interest of the mortgagor which passes, the power of sale given to the mortgagee or trustee carries with it authority to execute a deed conveying the mortgagor's interest. The deed should name the mortgagor as grantor; but an equitable title may pass if by mistake the mortgagee executes the deed in his own name.[91] The purchaser is not entitled to demand that the deed contain any covenants; but it should recite sufficient facts to show the regularity of the sale. Such recitals will not be taken as prima facie evidence. The purchaser's title is of course subject to any defect or irregularity in the proceedings and may for this reason be wholly void. If, for instance, a sale under a trust deed is made before the debt is due, no title passes.[92] Where the mortgage stipulated that the sale should be for

[90] Hall v. Bliss, 118 Mass. 554; Woonsocket Savings Inst. v. Amer. Worsted Co., 13 R. I. 255.

[91] Moseley v. Rambo, 106 Ga. 597.

[92] Long v. Long, 79 Mo. 644.

cash, it was held that the purchaser could not enforce a sale on credit.[93] But a sale which is void because of some irregularity will usually operate as an assignment of the rights of the mortgagee under the mortgage, on the principle of subrogation. To have this effect, the sale must be made on the authority of the mortgagee.

The purchaser is liable if he refuses to go ahead with the purchase after bidding at the sale. The mortgagee may maintain a bill for specific performance or an action for damages. There must be a written memorandum of the sale before the purchaser can be held, but for the writing of it the auctioneer is the agent of both parties and the purchaser may be held on his memorandum made at the time of the sale. The mortgagee or trustee may waive the right to specific performance, and conduct another sale. The purchaser has no obligation to see that the proceeds of the sale are properly applied by the mortgagee, unless he knows of the mortgagee's intention to misapply at the time of payment. In general, the payment discharges the purchaser from all obligations incurred by the purchase.

121. **The proceeds of the sale.**—The first claim upon the proceeds of the sale is that of the mortgagee or trustee for the expense of the sale and the satisfaction of the debt secured. Where several notes are secured by one mortgage, with no provision for priority among them, the proceeds must be applied to them pro rata if all of them cannot be satisfied in full. But it is competent for the parties to

[93] Cassell v. Ross, 33 Ill. 244.

make any stipulations governing the application of the proceeds.

It is more difficult to determine what shall be done with the surplus after the debt is satisfied. Generally the mortgage itself will provide for its disposition. In the absence of such provision, the surplus may be applied to the payment of the junior mortgages if their claims are asserted seasonably. Where there were three successive mortgages on land, and a sale was made under the second which did not in any way affect the lien of the first, the Missouri court held that the surplus should be applied on the third mortgage.[94] If the junior mortgagee fails to make any claims to the surplus, the mortgagor may enforce its payment to himself, provided he was the owner of the equity of redemption at the time of the sale. If the mortgagor died before the sale, the general rule is that the surplus must be paid to his heir or devisee, who alone can maintain action for it. In Massachusetts, the personal representative is permitted to recover the surplus, but is forced to hold it in trust for the persons who would have had the land but for the sale.[95] The mortgagee's liability for the surplus may be enforced in an action at law for money had and received. This is an action of an equitable nature, and the mortgagee's position is very similar to that of a trustee. If there are numerous claimants each may prosecute a separate action against the mortgagee. But to save the consequent embarrassment, the mortgagee

[94] Helweg v. Heitcamp, 20 Mo. 569.
[95] Varnum v. Meserve, 8 Allen 158 (Mass.).

should file a bill of interpleader in a court of equity asking that the various claimants be ordered to litigate among themselves. This is the safest procedure for the mortgagee, inasmuch as a payment to one claimant, though bona fide, will not release him from liability to others.

If, instead of a surplus, there is a deficiency, the mortgagee may maintain his action against the mortgagor or any assignee who has assumed to pay the debt. The sale does not extinguish the mortgagor's obligation beyond the extent to which it is actually satisfied.

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INTERPRETATION OF STATUTES

BY

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1. **Power and duty.**—The state is divided into three grand departments,—legislative, judicial, and executive. The legislative enacts what the law shall be; the judicial interprets the meaning, validity, and effect of the enactment; and the executive administers the law as interpreted. There is no other branch of the government enabled to interpret. It would not do to leave to the legislative both the enactment and interpretation. To submit to it the application of every law to each particular case would turn the legislature into a court. The effect of submitting the question to the chief executive for decision is illustrated by the experience of the Romans, who took such matters to the emperor for decision. The wisest and most logical method is to leave the matter to the courts, to be determined for each case as it arises, and such is the spirit of our Constitution.

The court must decide whether the statute is public or private, general or local, valid or void; whether two statutes can stand together; if so, what are their meaning and effect, and whether and how they apply

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to the case in hand. These are questions of law. The judge cannot escape his duty by submitting the questions to the jury for decision; the court must decide. When the Constitution of the United States declared that "the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, and all other officers of the United States whose appointments are not otherwise provided for;" and, pursuant thereto, the President, with the advice and consent of the Senate, appointed William Marbury Justice of the Peace for the county of Washington, in the District of Columbia, for five years, and later, on direction of the President, James Madison, Secretary of State of the United States, refused to deliver the commission of appointment, and Marbury asked the Supreme Court of the United States to compel delivery by a writ of mandamus, that court was compelled to perform a delicate duty. It was compelled to interpret the Constitution and the statutes, and declare the right of the appointee, though in direct conflict with the President.[1] But foreign laws are matter of fact to be proved to and found by the jury.

2. **Duration and territorial operation.**—Statutes once enacted continue to operate until repealed unless limited to a specified time by their own terms. They are not displaced by revolution in the government, as in case of the American Revolution, nor by cession of territory, as in case of the Louisiana Purchase.

When the legislature of a country enacts a statute, it binds the citizens of that country there; and when

[1] Marbury v. Madison, 1 Cranch 137 (U. S.).

those citizens settle in a foreign land, not before under the domain of any law, the jurisdiction of the sovereign over them continues, and they remain bound by the law of the mother country when they settle in the new colony; or, otherwise stated, they retain the blessings of their home law, with which they are familiar, and which is in all probability best suited to their condition and habits. Thus the American colonies were bound by the English common law and statutes existing at the time of the settlement. But the statutes enacted by the Parliament of England after the settlement did not extend to the colony unless given colonial operation by express enactment. Statutes of England would be common law in Pennsylvania, which, by reason of its earlier settlement, would not operate in Virginia. As to most of the states, the matter is controlled by express enactment. For example, the legislature of the Territory of Michigan, in 1820, enacted that all the statutes of England, France, the Province of Quebec, the Territory of Indiana, and the Northwest Territory were thereby repealed; thus avoiding the endless uncertainty and inconsistency of the conflicting laws of the various sovereignties under which the land had from time to time been held. On the other hand, it has recently been held in Kansas that the English Statute de Donis, enacted in 1285 A. D., is in force in Kansas, though the land of that state never was a part of any English colony. This result is gathered from an interpretation of the Kansas statutes.[2]

3. **General rules.**—The Constitution of the United

[2] Ewing v. Nesbitt, 88 Kan. 708, 129 Pac. 1131.

States is the paramount law of the land. Subject to it stand the acts of Congress and treaties made within the Constitution; next in order are the constitutions of the states, then the state statutes, and finally, the ordinances of local municipalities: each within their own territorial limits. If an old and a new statute or constitutional provision conflict, the later displaces the former. The general object of all interpretation is to arrive at the true intent of the law-making body. In search for the legislative intent, the court will consider every part of the statute, the former law, the mischief, the remedy, and whether a proposed interpretation would give effect to the probable intention, render any part of the statute inoperative, produce an unreasonable effect, injustice, conflict with contemporary legislation, change a well-known and established policy of the state, violate a provision of the Constitution, create an absurdity; and the court will not believe the legislature intended any of these strange things in the absence of the clearest expression of intention, nor if there is any other available construction that can be put on the law.

Other things being equal, the legislature will be presumed to have used words in their plain, ordinary meaning, and technical terms in their technical sense, and the spirit will be taken to be expressed in the letter of the law; but when such interpretation would result in any of the absurdities above indicated, the court will endeavor to give the statute a reasonable interpretation though not in accord with its strict letter. The legislative intent being plain, there is

no room for considerations of wisdom or policy, and it is the duty of the court to give the legislative meaning effect so far as it is in accord with the Constitution. If part of the statute is unconstitutional, the rest is not destroyed thereby, unless to let it stand alone would produce an unreasonable result that cannot have been intended by the legislature. When the income tax cases first came before the court it was held that part of the statute provisions were unconstitutional, but on rehearing it was concluded that without these the legislative intent would not be effectuated, and so the whole was held void.[3]

4. **Presumptions in aid of construction.**—It is to be presumed that the legislature knew the scope of its powers, and did not intend the act to apply to acts done or contracts made outside of the state, in no way affecting persons or property in the state; nor intend the act to violate the constitutional restrictions. It is presumed that the legislature knew the prior state of the law, and seeks by the act to make some change therein. If the law is adopted from some other state in which it has already been interpreted by the courts, the legislature is presumed to have known of such interpretation and to have intended to adopt it. The established interpretation is a part of the law adopted, and the decisions of the courts of the state from which the act was adopted, made before the adoption, are binding on the courts of the state adopting the law. It is a principle, always held sacred in the United States, that laws by which human conduct is to be regulated look

[3] Pollock v. Farmer's Loan and Trust Co., 158 U. S. 601, 15 S. C. R. 912.

forward, not backward; and statutes will never be given a retrospective operation unless the intention of the legislature is so clearly expressed as to exclude any other interpretation.

5. **Intrinsic aids to construction.**—The statute must be construed as a whole, and given such an interpretation as will give every provision and word in it effect, and such construction as will avoid bringing one provision in conflict with another. Even an unconstitutional provision may be considered in arriving at the meaning of a provision which is constitutional. If a general and a special provision conflict, it will be presumed that the special was intended as an exception to the general, and thus both are given effect. It is a technical rule of last extremity that if two provisions conflict the last shall prevail, as the last expression of the legislative will. If the former provision effectuates an obvious policy of the law, it will prevail over a later apparently inconsistent clause. Where the context renders the meaning of a term in one part of a law clear, such will be presumed to have been its meaning in another place where the sense would otherwise be doubtful. The context may make the meaning clear where an inappropriate word is used. The court may even interpret a word out of the statute, if such is the manifest meaning.

On conviction of soliciting sales of intoxicating liquors in quantities less than five gallons, in violation of statute, it was contended that the statute was void for uncertainty, being entitled: "An act prohibiting the sale of intoxicating liquors, and for the

granting of license for the sale of spirituous and vinous liquors, and providing a penalty for violation thereof"; and enacting in the first section that whoever, not having a license, shall solicit any person, not having a license to keep a saloon, or a physician or druggist, to buy or contract for delivery of liquors in less quantities than five gallons, shall be subject to a fine; and enacting in section two that the county commissioners may license persons to sell not less than five gallons to persons not licensed to keep a saloon; the court held the statute valid, and that the second "not" in the second section should be omitted in reading. The court declared the meaning should be effectuated despite awkward, slovenly, ungrammatical English, and discussed many of the other rules declared in this section.[4]

6. **Same—Preamble, title, and recitals.**—The title of a statute constitutes no part of it, and cannot be resorted to in aid of construction where the meaning and scope of the enacting provisions are plain and unambiguous; it neither extends nor restricts the scope of the act; but should not be ignored in cases of doubt, and may furnish the key to the true meaning. The effect of the title is somewhat greater if the Constitution requires the act to be entitled and the purpose to be stated in the title. On mandamus to compel the auditor to register an issue of refunding bonds, he defended that the act, as shown by its title, related only to "warrant indebtedness"; but the mandamus was granted, the court saying: "There is nothing in our organic act or statute which requires

[4] State v. Bates, 96 Minn. 110, 104 N. W. 709, 113 Am. St. Rep. 612.

that the title of the act should be expressive of its contents. In the absence of any such provision, either in the organic law or other statutory provision, it is not essential, for the purpose of upholding the validity of the law; and hence the title is only to be referred to in case of ambiguity arising out of the body of the law. * * * Originally in the English courts the title was held to be no part of the act; 'no more,' says Lord Holt, 'than a title of a book is part of the book.' Mills v. Wilkins, 6 Mod. 62. It was generally framed by the clerk of the House of Parliament where the act originated, and was intended only as a means of convenient reference. At the present day the title constitutes a part of the act, but it is still considered only as a formal part. It cannot be used to extend or restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the legislature. In this case there is no doubt that the legislature intended to provide for and regulate the issuance of refunding bonds in certain cases; hence there is no occasion to refer to the title of the act for aid in its explanation."[5] Similar rules apply to the preamble and recitals. The preamble shows the motive of the legislature, but the enactment is often broader or narrower than the recitals, and is not controlled by them.

7. **Extrinsic aids to construction.**—The court will take judicial notice of common law and statutes, and

[5] Territory v. Hopkins, 9 Okla. 133, 59 Pac. 976.

matters of public general history and knowledge. And in ascertaining the intention of the legislature the court will consider other laws existing on the subject at the time this one was enacted, the provocation that led up to the enactment, the history of the times and the history of the particular act. The journals of the houses may be resorted to; but no reliance in interpretation can be laid on debates on the bill in course of passage. It is well known that members do not all act from the same motives nor on the same understanding. If custom and usage since the statute was passed have put a practical construction upon it, this has great weight with the courts in construing the law. Where a tax law required persons, seeking to deduct debts owed from credits taxed, to file a list of such debts, and railways were taxed according to their gross earnings, it was held that the fact that defendant had been in business in the state for thirty-five years, and neither it nor any other railway company had ever filed or been asked to file a list of debts, showed that the statute did not apply, and had never been understood to apply, to railway companies.[6]

8. **Strict construction.**—It is often said that penal statutes are strictly construed, as are also statutes in derogation of the common law; but that remedial statutes are liberally construed. It may often be matter of debate whether a particular statute is remedial or penal, and it is not meant by the statement that in any case the words will be given the narrowest or the broadest possible construction. In any case the language is to be given a fair interpretation.

[6] State v. Northern Pac. Ry. Co., 95 Minn. 43, 103 N. W. 731.

Among statutes regarded as penal may be mentioned all acts imposing a fine, corporal punishment, imprisonment, or forfeiture, though enacted to promote peace and good order in society; and in all these cases the accused is to be given the benefit of the doubt as to the meaning of the language, and never held if his act does not violate its letter; and yet even here a fair interpretation is to be given. When it was made a crime for a man to marry his brother's wife, marrying a brother's widow was held to be criminal within the intent of the statute.[7] Statutes giving right of recovery to informers other than the party injured, or more than compensatory damages to an injured party are also penal and to be strictly construed. Even statutes highly remedial are to be strictly construed when they create a right of recovery against one not liable before. Statutes granting special privileges (such as the power to private corporations to exercise eminent domain); restricting natural liberty (by restraining persons from practicing a business without license); against natural right (requiring services without compensation from doctors in specified cases); in derogation of common law rights (such as Statutes of Limitations); are also instances of statutes to be strictly construed.

9. **Liberal construction.**—Remedial statutes are to be liberally construed; and in the modern sense these include such as are designed to cure defects in the prior law, whether common or statutory, substantive or procedural, and have been said to include all statutes enacted for the common good and not

[7] Commonwealth v. Perryman, 2 Leigh 717 (Va.).

clearly within some class to be strictly construed. As examples of remedial legislation may be mentioned statutes to prevent perpetration of frauds, to reform procedure in the courts, to protect the public from contagious diseases, unsanitary conditions, exposure to injury by accident, or giving new remedies for old wrongs. Remedial statutes are to be construed so as to suppress the mischief and advance the remedy. Though now a matter of history and no longer in use, it was once the practice to construe such laws according to the equity of the statute as it was called.[8] This doctrine serves today only as an occasional reference to justify action by courts in extending statutes beyond their terms in extreme cases, which is rarely resorted to. The danger of giving effect to what is called the equity of the statute is often mentioned, and practically all that remains of the doctrine is thus expressed by Lord Camden: "Where it is clear the person or thing expressed is put by way of example, the judges must fill up the catalogue; yet we ought to be sure from the words and meaning of the act itself, that the thing or person is really inserted as an example."[9] The principle of liberal construction operates to extend the statute to cases within the intention, but not within the letter, for example,

[8] For example, Littleton says (§21): "Though they be not by express words specified in the said statute, they are taken by the equity of the same"; of which Lord Coke says: "Equity is a construction made by the judges, that cases out of the letter of the statute, yet being within the same mischief, or cause of the making of the same, shall be within the same remedy that the statute provideth; and the reason hereof is, for that the law-makers could not possibly set down all cases in express terms." Coke on Littleton, 24b.

[9] Entick v. Carrington, 19 St. Tr. 1067 (Eng.).

entitling defendant in whose favor judgment was rendered to garnishment under a statute providing that the plaintiff may have garnishment to recover balance due on any judgment.[10] But the principle also operates to restrict the statute to cases within the legislative intention, excluding those within the words but not within the meaning. Thus, the Statute of Frauds, designed to prevent fraud, has been so interpreted as to prevent designing persons perpetrating frauds by shielding themselves behind the words of the law, and part performance has been held to take the case out of the Statute.

10. **Repeals.**—All statutes are in their nature repealable. No legislature can bind itself or its successors not to repeal a statute, nor limit the time or manner of repeal. The power that enacts can repeal. The repealing act may be passed the same day as the act repealed. Only the legislature can repeal. Popular opposition, neglect to enforce, and long continuance of inconsistent custom, may influence the court to clemency, or even resolve a doubt as to the meaning, but they cannot repeal. Repeals are express or implied. An express repeal may operate though all the statute but the repealing clause is void; but when the repealing clause is manifestly to clear the way for the law containing the repealing clause, if the rest of the law is void, the court will deny effect to the repealing clause also, since there is no intent to repeal the former law without the substitute taking its place. For example, when a law providing a new charter for the City of Galveston was held unconstitutional

[10] Esler v. Kent, Circuit Judge, 108 Mich. 543, 66 N. W. 485.

except the clause repealing the former charter, the court held that ineffective also, since the legislature could not have intended to leave the city without any provision for government.[11]

All prior laws inconsistent with a later law are repealed by implication; but there must be a clear repugnancy, in the absence of an express repeal. The court will otherwise harmonize the acts if possible, or hold the prior law repealed only so far as necessary to give place to the later. But when the new law is manifestly intended to cover the whole field it will be construed to repeal the whole of the old law by necessary implication. Strong examples of this sort are general revisions, and statutes amending the former law to "read as follows." The effect of the repeal is that as to all but transactions entirely closed the law is as if it had never been. In the absence of a saving clause no action can be maintained on the repealed law, even as to past transactions. By the repeal the old law is revived as if it were newly enacted. On motion in arrest of judgment on conviction in 1831 of digging up a dead body, February 20, 1831, in violation of the statute of 1814, repealed a few days after the act by the statute of 1830, it was said by Shaw, C. J.: "It is clear that there can be no legal conviction for an offense unless the act be contrary to law at the time it is committed, nor can there be a judgment unless the law is in force at the time of the indictment and judgment. If the law ceases to operate by its own limitation or by a repeal at any time before judgment, no judgment can be

[11] Galveston & W. Ry. v. Galveston, 96 Tex. 520, 74 S. W. 537.

given. Hence, it is usual in every repealing law to make it operate prospectively only, and to insert a saving clause, preventing the operation of the repeal, and continuing the repealed law in force as to all pending prosecutions, and often as to all violations of the existing law already committed. These principles settle the present case. By the statute of 1830, chapter 57, § 6, that of 1814 was repealed without any saving clause. The act charged upon the defendants as an offense was done after the passing of the statute of 1814, and before that of 1830. The act cannot be punished as an offense at common law, for that was not in force during the existence of the statute; nor by the statute of 1814, because it has been repealed without a saving clause; nor by the statute of 1830, for the act was done before that statute was passed. No judgment, therefore, can be rendered against the defendants on this indictment."[12]

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[12] Commonwealth v. Marshall, 11 Pick. 350 (Mass.), 22 Am. Dec. 377.

QUIZ QUESTIONS

LAW OF NEGOTIABLE INSTRUMENTS

(The numbers refer to the numbered sections in the text.)

1. What are the common varieties of negotiable instruments?
2. What can be said as to the origin of bills and notes? What special name is given to the law pertaining to commercial paper?
3. Define a bill of exchange. What is a foreign bill? What is an inland bill?
4. Write out a bill of exchange and give the proper designation to each of the parties.
5. Define a check. Write a check without using a printed form.
6. Define a promissory note. Draw up a promissory note, negotiable in form, and name the different parties.
7. What were the early differences between negotiable instruments and common law contracts? Do all of the early differences exist to-day?
8. What is meant by negotiability?
9. Trace briefly the modern accomplishments in the way of codifying the rules of the law merchant. Find out whether the Uniform Negotiable Instruments Law has been adopted in your state. If it has, use the statute as there adopted in your study.
10. A in the course of a conversation with B, said, "I will pay you or any person you may suggest, tomorrow, $5." Is this a promissory note?
11. What are the requirements concerning the signing of bills and notes? Must a person use his real name in executing a note?

12. What is the difference between a promise implied in fact and a promise implied in law? Which is required to support a promissory note?
13. A wrote on a piece of paper, "Good to X or order for $5" and signed his name and delivered it to X. Is this a good note?
14-15. A wrote to B, as follows: "Please pay C the $5 you owe him," signed, "A." Is this a good bill of exchange?
16. A promises in writing to deliver X or order a horse, on June 1. Is this a promissory note?
17. What is meant by money as applied to the law of bills and notes?
18. What is the provision of the N. I. L. as to the designation of a particular kind of money?
19. I promise to deliver $100 worth of Mexican silver dollars to X or order in Chicago. Is this a good promissory note?
20. Is an instrument negotiable which requires the obligor to do anything else in addition to the payment of money?
21. I promise to pay $5 or deliver a pig to X or order, June 1, as he may desire. Is this a good note? Suppose the latter part of the promise should read, "as I may desire." Would your answer be the same?
22. State the effect of giving authority in the note to sell collateral securities.
23. What is the effect of giving authority in the note to confess judgment?
24. What is the effect of a waiver of exemptions?
25. What is the requirement of the law merchant as to certainty? Name the four particulars in which there must be certainty.
26. I promise to pay X or order $5,000 if he finishes my house by June 1. Is this a good promissory note?
27. What is the effect of promising to pay *out of a particular fund*?
28. May a particular fund be indicated in any way so as not to render the promise or order conditional?
29. What is the effect of stating, in a note, the transaction which gave rise to the instrument? Is it proper to say

that such a statement will never affect the validity of the note?

30. What is meant by a conditional sale note? Is such a note negotiable?
31. Suppose A promises to pay B or order $100 on July 1, 1913, and the recital is made that the instrument is for 100 bushels of wheat to be delivered by B to A on September 1. Is this a good note?
32. I promise to pay X or order $5 and such other sums as I may owe him on July 1. Is this a negotiable note?
33. State the rules with reference to an agreement to pay attorneys' fees and costs of collection. Has the N. I. L. brought about any changes in the law in this respect?
34. On what reasoning has the conclusion been reached that an agreement to pay exchange does not affect the negotiability of an instrument?
35. May the amount of interest that will have to be paid be uncertain, without rendering the note non-negotiable?
36. There is added to a note an agreement by the maker to pay all taxes that may be levied against the note. Is the note negotiable? Will it make any difference if such a stipulation is inserted in a mortgage given to secure the note rather than in the note?
37. To what extent must a negotiable instrument be certain as to the time of payment?
38. Is an instrument payable on or before a certain date sufficiently certain as to time of payment to be negotiable? Is a note payable in installments, with a provision that in case of failure to pay any installment when it is due the whole shall become immediately due and payable, negotiable?
39. Is a note, payable when the maker harvests his next crop of corn, negotiable?
40. Is a note, payable on demand, negotiable? When is such an instrument due?
41. Is a bill or note complete without a payee? Who may the payee of a bill be? Who may the payee of a note be?
42. What will take the place of the actual naming of the payee?

43. A draws a check payable to himself or order and indorses and delivers it to B. Is this a good check?
44. What is meant by alternative payee? Is an instrument drawn, payable to an alternative payee, negotiable? What was the law prior to the N. I. L. and what is the rule of the statute?
45. What is a "floating payee"? What is the law relative to the same?
46. Is it necessary to address a bill to a drawee by name?
47. Is a bill good which is addressed to drawees in the alternative? Who is a referee in case of need?
48. "Pay C $5; To B; Signed, A." Is this a negotiable bill of exchange?
49. What is the difference as to methods of transfer, between paper payable to order and paper payable to bearer?
50. What is required to make an instrument payable to order?
51. Enumerate four ways in which an instrument may be made payable to bearer?
52. A check is made payable to John Smith, a well-known person living in your community. Could such a check by any possibility be considered as payable to bearer?
54. What is the character of an instrument in which the name of the payee does not purport to be the name of any person?
55. Name four non-essentials as to form. What may be done if a date is omitted? What is the effect of ante-dating or post-dating an instrument?
56. May an instrument be treated as negotiable, from which is omitted the customary expression "value received" and which bears the seal of the signer?
57. A executed a note in favor of B and placed it in his pocket, intending to hand it to B the next time he should see B. The next day A died. The note was found in A's pocket. Is B entitled to the note?
58. Is a negotiable instrument enforcible, for which no consideration has been given?
59. What, in general, constitutes a consideration? Is anything other than money a good consideration?
60. Is pre-existing debt good consideration? Look up the law in your own state.

61. What is meant by consideration being presumed?
62. In what way does accommodation paper differ from other paper, with respect to consideration?
63. The figures on a check indicate that it is for $8, while the words indicate that it is for *eighty* dollars. What sum is the holder of the check entitled to?
64. If the conflict is between written and printed provisions, which shall prevail? If there is doubt as to whether an instrument is a bill or a note how is it dealt with?
65. A note in the ordinary form is signed in the customary place by B. In the upper left hand corner the signature of X appears. Will X be treated as a joint maker with B? What is meant by joint and several liability?
66. What four general well-settled rules may be stated with reference to signatures to negotiable paper?
67. Who is liable on a note signed "X Administrator," without more? If B desires to sign a note as agent for C, how should he do it, so as to bind C and escape all personal liability?
68. A, under the mistaken belief that he has authority from B, signs B's name to a note. What kind of an action may be brought against A by the holder of the note?
69. A drew a check in favor of B or order, leaving the amount blank. A authorized B to fill it up for a sufficient amount to pay a claim which A owed X, the exact amount of which was not known at the time the check was drawn. It was understood between A and B, however, that in no event should the amount inserted in the check exceed $100. B fraudulently filled the check up for $500 and sold it to C. To what amount is C entitled?
70. What is the rule under the statute with reference to the case stated in the previous question?
71. Suppose a note is executed with the amount left blank and is filled up for an unauthorized amount before it is delivered to the payee. What are the rights of the payee?
72. What is the purpose of the acceptance of a bill of exchange?
73. What is necessary to satisfy the requirement that an acceptance shall be in writing and signed?

74. Under what circumstances will an acceptance on a paper other than the bill be considered a good acceptance?
75. A was the holder of a bill drawn on B. A mailed the bill to B and requested him to accept it. B threw the letter and bill into the fire. What are A's rights?
76. What is the difference between a general and a qualified acceptance? Is there any reason why the holder of a bill should hesitate about consenting to a qualified acceptance?
77. Name five different ways in which an acceptance may be qualified?
78. Who is entitled to accept a bill?
79. What is meant by acceptance for honor?
80. What is the meaning of negotiation?
81. What must be done to negotiate paper payable to bearer?
82. May any paper other than that originally payable to bearer, be negotiated by delivery alone?
83. What is the doctrine of Smith v. Clarke? What effect does the N. I. L. have on the doctrine of this case?
84. A bill payable to A or order is handed over to B. Is it negotiated?
85. What are the usual forms of indorsement?
86. What is the effect of an indorsement in the following form: "I hereby assign the within instrument to B"?
87. May an instrument be negotiated by making the indorsement in the form of a guaranty?
88. A, the payee of a note, writes his name across one end of the face of the note and delivers it to B. Is this a negotiation to B? Is an indorsement on an attached paper good?
89. A note for $300 is indorsed as follows: "Pay B $150 and C $150," the indorsement being signed by the payee. What are the rights of B and C?
90. A check is made payable to A and B. B, who is in possession of it, indorses his name on the back of it and delivers it to C. What are C's rights?
91. A note is made payable to "X, cashier of the Y Bank." How may it be negotiated?
92. How would you indorse a check in which your name was misspelled?
93. May the payee of a check, who is an infant, transfer the check?

94. Name the different kinds of indorsements.
95. Under what circumstances is an indorsement said to be restrictive?
96. "Pay B and no one else." What kind of an indorsement is this? What effect would this indorsement have upon the rights of B?
97. A note payable to A or order is indorsed by A as follows: "Pay to the order of B, for collection." B indorses it over to his grocer to pay his grocery bill. What are the rights of the grocer?
98. A note to A or order is indorsed, "Pay B or order for the benefit of C." In whose name should the action against the maker be brought? What are B's rights against A in case the maker fails to pay?
99. "Pay B or order, without recourse." What is this form of indorsement called? What is the effect of such an indorsement?
100. Define a conditional indorsement. Should the maker or drawee find out whether the condition has been fulfilled before making payment?
101. A is the payee of a note. He turns it over to B in payment for a horse, but forgets to indorse it. What are B's rights? Suppose A should later write his name on the back of the note, but that at the time of his so doing B had learned that the note was obtained from the maker by A by fraud. What would B's rights against the maker be?
102. Who is the *holder* of a negotiable instrument? What is the difference between the rights of a holder and the rights of a holder in due course?
103. Define "holder in due course."
104. May one be the holder in due course of an instrument which is not at the time of the transfer, complete and regular on its face? What is meant by this expression?
105. Does it necessarily follow that one to whom a negotiable instrument is transferred when it is overdue, cannot recover?
106. Suppose a note, the due date of which falls on Sunday, is transferred on Monday, may the transferee be treated as a holder in due course?
107. Is it safe to accept the transfer of an instrument payable

in installments, after the first installment is due, without ascertaining whether such installment has been paid?

108. How soon after its issue may suit be brought on a note made payable on demand? Is a demand necessary before filing suit? Is the general rule applied to certificates of deposit?

109. If demand paper is transferred six weeks after it is issued, may the transferee be considered a holder in due course?

110. A finds a note payable to bearer and makes B a present of it before maturity. Is B a holder in due course? Would it make any difference if B had received it in payment of a debt owing from A to B?

111. What constitutes bad faith on the part of a transferee? See also 112 in answering this question.

113. Are there any circumstances under which a transferee may be a holder in due course, notwithstanding his knowledge of previous defects of title?

114. A obtains a note from B by fraud. The face of the note is $500. A transfers it to C before maturity for $400. C takes the note in good faith. What will be the amount of his recovery from B?

115. Suppose in the previous case, C had agreed to pay $500 for the note and had paid $400, but before paying the last $100 had learned of the fraud practiced on B. What amount would C be entitled to?

116. Suppose in the case stated in 114, this note had been indorsed to C as security for the loan of $400 from C to A. How much could C recover?

117. Is the burden on the plaintiff to prove that he is a holder in due course or on the defendant to prove that plaintiff is not a holder in due course?

118. In what way is the subject of holder in due course related to the subject of defenses? Why is it necessary to classify defenses? When is the title of a holder said to be defective?

119. What is a real defense? Name the real defenses. What is a personal defense? Name the personal defenses.

120. In what two different senses is fraud used?

121. Give an illustration of fraud in the execution, otherwise called fraud in the inception.

122. What effect does the negligence of the signer have upon his defense of fraud in the inception? Why?
123. What is the provision of the N. I. L. with reference to fraud? How should the statute be construed?
124. What is the character of the defense of illegality?
125. What is the character of the defense of no delivery?
126. Against whom is the defense of lack or failure of consideration available?
127. A accepts a bill, payable June 1. The holder does not present the bill for payment till June 5. Does this delay affect the rights of the holder against A? Would it make any difference if the bill were made payable at a particular bank and A had funds there for the payment of the bill on June 1?
128. Does the loss or destruction of an instrument preclude recovery thereon?
129. What admissions in common do the maker of a note and the acceptor of a bill impliedly make?
130. If a bank pays a check to which the drawer's name has been forged, may the bank recover the money from the person to whom it was paid? Could the bank account of the person whose name was forged be properly debited with the amount paid out?
131. Is the bank in any different position where the amount for which a genuine check was originally drawn has been fraudulently altered?
132. What is meant when it is said that the liability of the drawer of a bill is a secondary liability?
133. What, in general, are the steps necessary to fix the liability of the indorser of a note?
134. If there are several indorsements on a negotiable instrument, in what order are the indorsers liable? May the last transferee sue anyone other than his immediate indorser?
135. What is the liability of an anomalous or irregular indorser?
136. Is any liability imposed upon an indorser, other than that based upon his contract of indorsement? Does one who indorses without recourse escape all liability? What lia-

bility is imposed upon one who transfers bearer paper by delivery only?

137. A indorses a note to B and B to C. If the note were forged may C sue A for a breach of warranty? A is the holder of a note payable to bearer. He transfers it by delivery to B and B to C. If the note were forged, may C sue A for a breach of warranty?

138. What will constitute a breach of the warranty that the instrument is genuine and what it purports to be?

139. A note comes to B under a forged indorsement. B does not know that the indorsement is forged. B indorses and sells the note to C. What are C's rights against B?

140. A, the payee of a note, is an infant. A indorses the note to B. B, in ignorance of the fact that A is an infant, indorses the note to C. A later repudiates the indorsement and recovers the note from C. What may C do?

141. What warranty with reference to facts that render an instrument valueless is imposed on a seller?

142. What are the four general requirements as to presentment for payment necessary to charge parties secondarily liable?

143. When should an instrument, falling due on Sunday, be presented for payment? When should an instrument dated February 28, and payable one month from date be presented for payment?

144. When must a note payable on demand be presented for payment? When must a bill payable on demand be presented for payment?

145. When must a check be presented for payment? What is the effect of delay in presenting a check, upon the indorser? Upon the drawer?

146. Is the presentment of a bill or note at the residence of the acceptor or maker, where no place for presentment is indicated, at 10 o'clock at night a good presentment?

147. What is the proper place for the presentment of an instrument?

148. The maker of a note gives his address, in connection with his signature as 14 Main Street, Urbana. On the day the note falls due, the holder goes to this address at 3 o'clock in the afternoon. The only person in the office is a stenographer. The note is presented to her and she says that

she knows nothing about it. The holder thereupon gives notice of dishonor to the indorser. Is the indorser liable?

149. By whom should presentment be made? Is it necessary to exhibit the instrument?
150. Under what circumstances will delay in making presentment for payment be excused?
151. Under what circumstances will presentment for payment be dispensed with entirely?
152. Why should a bill be presented for acceptance?
153. What bills must be presented for acceptance?
154. If the bill is one that must be presented for acceptance, how soon after the issue must the presentment be made?
155. By whom and to whom must presentment for acceptance be made? May presentment be made on Saturday?
156. When is presentment excused?
157. May a bill ever be treated as dishonored for non-acceptance, if acceptance is not expressly refused?
158. After a bill has been dishonored by non-payment or non-acceptance what is the next step that the holder must take in order to hold an indorser or drawer?
159. In what form must a notice of dishonor be? If a notice is deposited in the post office but never reaches the party to whom it is sent is such party discharged?
160. If the person giving and the person to receive notice live in the same place how soon must the notice be given? If they live in different places how soon must the notice be mailed?
161. A bill, before it is dishonored, is indorsed by A to B, by B to C, and C to D, and by D to E. June 1 the bill is dishonored in the hands of E. E mails a notice to D by eight o'clock June 2. D mails notice to C June 6. Is C liable to E? If E wanted to be sure of his rights against A, how soon should he give direct notice to A?
162. Is delay in giving notice ever excused?
163. Is notice ever dispensed with entirely?
164. By whom must notice be given? A note is dishonored in the hands of A. B is an indorser. A friend of B happens to hear the maker refuse to pay it and tells B. This is the only notice that B receives. Is he liable to A?
165. Is it necessary that the holder of a bill or note shall give

direct notice to each of the several indorsers, if there is more than one indorser, in order to preserve his rights against each? If not, how may the result be otherwise accomplished?

166. To whom should notice be given?
167. If an indorser lives in one town and has his place of business in another town, to which address may notice be sent?
168. When is it necessary to protest a dishonored bill?
169. What must be done in protesting a bill?
170. Under what circumstances is an instrument said to be discharged by payment? What is the effect of discharging a negotiable instrument?
171. May the liability of the parties to negotiable paper be ended in any other way than by payment in due course?
172. To what extent are parties discharged by alteration?
173. What is considered a material alteration?
174. What is meant by renunciation and what is its effect?
175. How otherwise than by failure to make a proper presentment and to give proper notice of dishonor, may parties secondarily liable be discharged?

QUIZ QUESTIONS

LAW OF SURETYSHIP AND GUARANTY

(*The numbers refer to the numbered sections in the text.*)

1. What forms does the contract of suretyship take? Define and distinguish surety and guarantor.

2-3. Who may become a surety or guarantor?

4. The plaintiff loaned to X, taking X's note, signed also by the defendant as surety. Is the lack of consideration available to the defendant as a defense should he be sued on the note? Suppose that the defendant had added his name to the note as surety after the execution of the note and it is delivered by X to the plaintiff and after the plaintiff had advanced his money; could the defendant then set up the defense, want of consideration?

5. When is a contract of guaranty negotiable? When not?

6. When is the contract of suretyship within the Statute of Frauds?

7. Where the contract is within the Statute of Frauds, what terms of the contract must the memorandum embody to make the defendant's promise enforcible?

8. If the Statute of Frauds uses the word *agreement,* is it necessary to state the consideration for the defendant's promise in the memorandum? What is the rule where the Statute uses the word *promise* instead of *agreement?*

9. (a) What is meant by *special promise?* (b) Must the obligation of the principal be an express one for the promise of the surety to be within the Statute of Frauds?

12. (a) An infant entered into a contract to purchase a bicycle for his own use. The defendant orally guaranteed the payment of the purchase price. Can he be held upon

his promise? (b) A railroad corporation took a lease of premises which was ultra vires because unauthorized by the company's charter? Can a director of the company who signed the lease individually as a surety be held liable for the rent?

13. Suppose A orally promises B that if the latter will become surety for a debt owing by C to D, he (A) will reimburse B for any amount he may be compelled to pay by reason of such contract. Can B hold A upon his promise?

14. A buys a team of horses from X and in payment of the horses makes an oral promise to C, X's creditor, to pay X's debt to C. Is A's promise within the Statute of Frauds?

15. A has in his possession property of X worth $500. C presses X for payment of a debt of long standing and A, in order to induce C not to sue X, feeling secure in having X's funds in his hands, orally promises C that he will see to it that X pays his debt. Can C sue A?

16. X transfers to A a piece of property worth about $500 in consideration for which A promises C, X's creditor, that he will see to it that C gets payment of his debt. Is the promise within the Statute of Frauds? Does the fact that consideration moves from the creditor to the new promiser take the new promise out of the Statute?

17, 18, 24 and 30. Enumerate and define four rights of the surety.

19. Suppose a surety dies and leaves a legacy to the principal debtor and the legacy is assigned before the surety's estate pays his debt. Does the assignee take the legacy free from the right of the surety's estate to reduce it by the amount owing to the surety's estate from the legatee?

20. If a surety pays only part of the debt may he sue the principal for reimbursement? Suppose a surety gives his negotiable note in conditional payment of the debtor's debt and before he has paid out any money he sues the debtor. Will he be allowed to recover? If so, how much?

21. A surety settles his principal's debt of $1,000 by a payment of $500. How much can he recover from his principal?

22. Illustrate the principle that the equitable right to recover indemnity is not dependent upon contract.
23. A surety pays the debt of his principal where the principal has the defense of fraud against the creditor, but the surety does not know of the existence of such defense. May he recover reimbursement from his principal?
25. There are three co-sureties, A, B, and C, and A pays the principal's debt, the principal being insolvent. A now seeks contribution from B, C being insolvent. If he sues at law how much can he recover from B? In equity?
26. A surety paid $500 on his principal's note for $1,000 when it became due. Two years later he paid the remaining $500. Six years after the note became due he demanded repayment from the principal and upon the latter's failure to pay brought suit for $1,000. He also sued a co-surety—the only other surety on the note—for contribution. The Statute of Limitations in force in the jurisdiction, barred actions on implied contracts after three years and on written contracts after six years. How much can the plaintiff recover from the principal? How much from his co-surety?
27. A and B indorse a note for the accommodation of the maker. B's indorsement follows A's. Can A hold B for contribution?
28. Suppose one note for $5,000 signed by A and B as makers, and another for $10,000 signed by C as maker, and both notes are put in the custody of one who wrongfully repledges them for $3,000 without the assent or knowledge of A, B, and C. For how much may the pledgee hold C liable? Could C have contribution from A and B? If so, for how much?
29. Suppose a surety with knowledge that the Statute of Limitations has run in favor of the principal debtor, and his co-sureties pay the debt. May he recover reimbursement from his principal or contribution from his co-sureties?
31. Suppose A is surety for X and X has deposited securities with him for his protection. Later B comes in as a surety of X on the same obligation without knowledge of A's

being a surety. B pays the debt and seeks to have the securities in A's hands applied for his benefit. Can he?

32. Give an example showing that the right to subrogation is available where the right to indemnity is not.

33. A surety pays a specialty debt or judgment which the creditor holds against the principal debtor and which gives the creditor a preference over the other creditors of the debtor. Is the surety, when he pays the debt, entitled to preference over other creditors of the debtor?

34. An insurance company pays a loss on insured property destroyed by a railroad company. Can the insurance company, after it has paid the loss where there is no assignment by the insured of his right of action against the railroad company, recover from the railroad company for the loss it has sustained?

35. If the surety pays the judgment against the principal debtor may he recover on such judgment without an assignment from the creditor?

36. When is the surety entitled to be subrogated to the securities held by the creditor?

37. C is surety for B on B's debt to A. Later D comes in as a surety for both C and B, and upon maturity of the obligation pays A. Later B pays C on C's representing to B that he (C) has paid the debt. Can D recover indemnity from B?

38. The principal gives the creditor a mortgage on his land to secure a $1,000 debt he owes the creditor for which debt C is surety, and the surety pays the creditor $500 and seeks to compel the creditor to assign the mortgage to him. May he?

39-41. Discuss the right to exoneration. Who are necessary parties to the suit? How is the right distinguished from the right to compel the creditor to proceed against the principal debtor?

43. When is one who undertakes to answer for the debt of a married woman liable? Does it ever make any difference whether his promise is in writing or not?

44. Does a promise to answer for the debt of an infant have to be in writing in order to be enforcible?

45. Can the surety be held on a joint bond which he signs with his principal if the principal's name is signed without the principal's authority?

46. When is a surety of a corporation contracting ultra vires liable?

47-48. Can the surety ever be held where the principal's obligation is affected by illegality? By fraud?

49. When sued by the creditor the surety pleads as his defense that the creditor secured the obligation of the debtor by duress. Is the plea sufficient?

50. Why does the non-performance of the contract by the obligee give the surety a defense?

51-55. Give examples of the extinguishment or suspension of the principal obligation by operation of law. In what way do they affect the surety's obligation? Why?

56. When will payment of the debt discharge the surety from further liability? When will tender of payment discharge the surety?

57. Upon what grounds does a release of the principal debtor by the creditor give the surety a defense?

58-60. Suppose the creditor for valid consideration covenants not to sue one of two joint obligors for a period of six months. One of the joint obligors is a principal obligor and the other a surety. Will the surety after the six months have expired have a defense if sued by the creditor? Would it change your answer if the creditor in his covenant not to sue had reserved rights against the obligor with whom he had a covenant? Would your answer be the same if the creditor had agreed for a valuable consideration to extend the time of payment for six months instead of covenanting not to sue for six months?

61. The principal pledges property with the creditor to secure his obligation of $1,000. A surety becomes bound with the principal upon the debt and some time later the creditor releases the securities which have been pledged with him. The value of the property at the time it is pledged is $500; at the time the surety enters, $600; at the time of its release by the creditor, $400, and at the date of maturity, $300. The surety is sued upon the

debt and wishes to set up as a complete defense the release of the securities. If he cannot do this what is the extent of his defense?

62. When does the failure of the creditor to apply funds in his possession in payment of the debt discharge the surety?

63. When and by what means may the surety compel the creditor to sue the principal debtor?

64. C writes A a letter, offering to guarantee B's payment of all goods he shall order from A within one year. A short time after the receipt of this letter A ships goods to B in compliance with an order from B. If B defaults in payment is C liable? Suppose C had died before A shipped the goods and A on shipping the goods had immediately sent notice to C; will C's estate be held liable?

65. C guarantees the payment of B's note to A. Upon the default of B, A fails to notify C. Is C liable upon the note?

66. (a) B, the maker of a note, gets C to sign the note as surety. After C signs, but before B delivers the note to A, the payee, B makes an alteration of the note extending the time of payment six months; A receives the note without notice of the alteration and the alteration has been so skillfully done that he is not careless in so receiving it; can A hold C liable on the note? Suppose the note had been altered by a stranger after its delivery to A without A's knowledge?

(b) Suppose that, after he has received the note of the makers, B and C, C signing merely as surety, A enters into a written contract with B to change the rate of interest from eight per cent to six per cent. Will C have a defense when sued upon the note, and if so, to what extent?

(c) Suppose after a note is delivered to A, the payee, upon which B and C are makers, C signing as surety, A by collateral agreement extends the time of payment to B for six months. After the six months are expired can A hold C upon the note?

67. Why will the fraud or misrepresentation of the obligee in securing the principal debtor's obligation give the surety a defense?

68. What is the rule with reference to the duty of the obligee to disclose facts to the surety?
69. Show how the duty imposed upon the obligee is not a duty to disclose to the surety the wrongful acts of the servant, but a duty to discharge the employee when he learns of his wrongful acts.
70. How does a release of one of several co-sureties by the creditor affect his rights against the others? A covenant not to sue? A failure to sue the debtor at the surety's request?
71. When may a surety avail himself of the set-off of his principal?
72. The debtor induces the surety to sign a blank bond with him, agreeing that it shall not be filled up for more than $4,000, and the debtor fills it up for $15,000 and delivers it to the creditor. For how much can the creditor hold the surety liable?
73. The creditor negligently loses the bond of the principal and surety. May he compel the accommodation surety to make a new bond?
74. A surety, bound jointly with his principal, died. Can the principal hold the surety's estate?
75-78. B and C are bound as principal and surety respectively upon a debt to A. They each mortgage their individual property to secure the obligation. Both B and C become insolvent and A asserts the right to foreclose both mortgages. May he?

QUIZ QUESTIONS

LAW OF MORTGAGES REAL AND CHATTEL

(The numbers refer to the numbered sections in the text.)

1. Give a general definition of a mortgage.
2. (a) What is the meaning of the term "law day"? (b) What is meant by the mortgagor's equity?
3. (a) When did the practice of securing debts originate? (b) Outline the history of the law of mortgages in England.
4. (a) Define vivum vadium. (b) Why was it given its name?
5. (a) Distinguish the mortuum vadium from the vivum vadium. (b) What are the advantages of each?
6. (a) Trace the early history of the mortgage at common law. (b) What led to the extension of equity jurisdiction over it? (c) What is meant by "court of conscience"?
7. Of what value is the equity of redemption, and why did money-lenders fight its establishment?
8. How does the modern mortgage differ from the ancient common law mortgage?
9. What is a Welsh Mortgage?
10. Explain the difference between formal and informal mortgages, and the necessity for the terms.
11. Distinguish between the equitable mortgage and the equitable view of a legal mortgage.
12. A leased to B for ten years. Later A mortgaged his reversion to B to secure the payment of a debt, which was duly paid. Under the original title theory of mortgages what was the effect of the payment?
13. What are the modern modifications of the title theory and to what extent does it prevail?

14. (a) What is the lien theory of mortgages? (b) Outline the steps in its development. (c) To whose influence is it to be attributed?
15. (a) Is the lien theory logical? (b) Give some of its obvious consequences.
16. (a) What advantages has the so-called "intermediate view"? (b) Which of the three views studied is most inclined to work out justice between the parties to a mortgage, without giving undue advantage to either lenders or borrowers?
17. In what portions of the United States are the two principal theories ascendant and why?
18. (a) What are the essential differences between equitable and legal mortgages? (b) Why are the two kinds necessary?
19. (a) A wished to borrow money from B who demanded as collateral that A should deposit with him the title deeds to all the property which he owned. A complied with the demand. What effect did this have on A's real and personal property in England? (b) In the United States? (c) Suppose A was a Missourian but the property was in England?
20. A agreed to give B a legal mortgage on Blackacre, but it was never executed. How would you advise B to proceed against A?
21. When he borrowed money from B, A said that his mare Bess should stand good for it. Has B any right against the mare, and if so how may he assert it?
22. A executed a mortgage of Blackacre to B, but forgot to seal it. In a state where seals are required for conveyances of real property, what are B's rights?
23. A agreed to sell Blackacre to B for a consideration. Before A's conveyance, B asks whether he has a mortgagable interest in Blackacre.
24. Compare an action by a vendor to compel specific performance of a contract to convey land, with an action to foreclose a mortgage on land.
25. A seeks to redeem Blackacre from an absolute conveyance which he alleges to have been made to secure a debt. B

objects to A's introducing testimony to prove his allegation on the ground that a written instrument cannot be varied by parol evidence. Is the objection valid?

26. A buys machinery from B on credit, the title to remain in B until the price is paid. A fails to pay on the day set—he later claims the right to redeem as a mortgagor. What are the rights of A and of B?
27. Distinguish between the mortgage and the pledge of a chattel.
28. What resemblance has an innkeeper to a mortgagee, with respect to his guest's baggage?
29. What is the function of a trustee in a deed of trust in the nature of a mortgage?
30. (a) What is the necessary mental capacity for the execution of a mortgage? (b) What effect is to be given to a mortgage by an infant? (c) By a married woman?
31. What is the effect of a mortgage of lands to a partnership?
32. May a contingent remainder in lands be mortgaged?
33. A, a cattle feeder, mortgaged to B all the cattle he owned at the time or should acquire during one year. Later C extended credit to A relying on certain cattle purchased at the time as security. What are the relative rights of B and C?
34. What is meant by a consideration of blood and affection, and is it sufficient to support a mortgage conveyance?
35. What is the general nature of debts and obligations which may be secured by mortgage?
36. A mortgaged to B to secure any advances to be made by B during the course of one year. Later, A executed a similar mortgage to C, of the same property. Both C and B now make advances, each knowing of the other's mortgage. Which is entitled to priority?
37. What statute is relied on by those courts who hold that a mortgage must be evidenced by some writing?
38. What are the principal parts of a mortgage instrument, and to what extent must it go into detail?
39. (a) What is a sufficient signing of a mortgage? (b) Who must sign it? (c) What is necessary as a seal?
40. What is the reason for requiring witnesses to a mortgage?

41. What is meant by acknowledging a deed?
42. A executed a mortgage of Blackacre to B, and put it into his desk. B came and found it and took it away. Is it a valid mortgage?
43. (a) Where should a mortgage of land be recorded? (b) What effect has record of a mortgage on a subsequent mortgagee?
44. (a) In what sense is the mortgagee owner of the property mortgaged? (b) Why is his interest in the property not subject to execution?
45. A conveyed Blackacre to B to secure A's promise to support B during the latter's life. The deed is silent as to possession. May B dispossess A?
46. What remedies may a mortgagee pursue to recover possession?
47. (a) A is a mortgagee in possession. May he plow a meadow and plant corn? (b) May he remove a fence around the front lawn of the mortgaged premises? (c) May he cut down shade trees because they are growing too near the house? (d) Is he under obligation to keep the fences whitewashed since they were in that condition when he took possession?
48. (a) A took possession of a farm which had been mortgaged to him and operated it at a loss. In a bill to redeem, the mortgagor asks that A be charged a fair rental value. For what is A liable? (b) If A takes possession and puts in a tenant who absconds without paying any rent, what is A's liability?
49. A takes possession of a farm mortgaged to secure a debt of $1000, and receives rent of $200 in one year. Is the doctrine of annual rents to be applied, and, if so, with what result?
50. (a) Having taken possession of a mortgaged lot, A was forced by the city to pay for paving the street in front of it. May the cost of the paving be charged to the mortgagor? (b) Suppose A had not been compelled to have the paving done, but had done it voluntarily?
51. In cultivating a farm mortgaged to him, A expended certain sums on fertilizer which was of some permanent

value to the mortgaged land. Is he entitled to complete reimbursement when the mortgagor seeks to redeem?

52. A part of the mortgaged premises was leased to A two years before the mortgage was executed, for seven years. A paid no rent. Another part was leased to B one year after the mortgage was executed, for seven years. Three years after the mortgage was executed, the mortgagee took possession. What were his rights against A? Against B?
53. A and B were payees of a promissory note secured by a mortgage on land. Under the title theory of a mortgage, what were their respective interests in the land?
54. A lent $2000 to B who gave a mortgage on certain horses to secure the payment of the debt. In what way can A's creditors reach the debt and A's interest in the horses?
55. A and B owned adjoining farms along the bank of a river, B being the upper proprietor. A mortgaged his farm to B, but A remained in possession. B diverts the water from the stream so that none flows by the mortgaged land. A seeks to prevent the diversion, but B contends that as owner of A's farm, he may use the water as he pleases. Is B's contention valid?
56. A seeks to avoid the effect of a conveyance made to B, on the ground that at the time of the conveyance the premises were under a mortgage held by C. Can he succeed?
57. A borrowed $200 from B and gave a mortgage on his $2000 farm to secure the payment of the debt. A is about to remove from the farm a house worth $500. B seeks to restrain the removal. What are A's rights?
58. A occupied a house for twenty years after he had mortgaged it to B, and during that time paid no part of the mortgage debt and no interest on it. B seeks to foreclose the mortgage, and A answers that by his adverse possession of the house he has gained title under the Statute of Limitations. Is A's defense good?
59. A brings an action of ejectment against C who answers that A is but a mortgagor of the demanded premises, the legal title being in the mortgagee B. Should A have judgment in the action?

debtedness in an action by B to foreclose. Will the set-off be allowed?

85. A mortgaged property to secure his debt to B and C, and later paid the entire debt to B. C now seeks to collect half the debt out of the property mortgaged. Should he succeed?

86. What is the effect on the mortgaged estate, of a payment made after the debt has been due some time?

87. (a) A paid his mortgage debt to B before it was due, and failed to have the note evidencing it cancelled. Later, and before the maturity of the note, B assigned the note to C who had no notice of the premature payment. Is A now liable to C? (b) Would the result have been the same if the assignment had been made after the maturity of the note?

88. Name two situations where a payment of the debt would be presumed, and state the method of rebutting the presumption.

89. What is to determine the way in which payments to a mortgagee are to be applied?

90. (a) State the principal *requisites* of a proper tender. (b) What is the effect of an improper tender, where the objection to accepting it is based on some other ground than the cause of its being improper?

91. (a) Under what circumstances might it be proper to annex a condition to the tender offered? (b) If A in making tender, requires that a receipt be given before it is accepted, has he annexed a condition which destroys its effect?

92. What was the effect at common law of tender made on the law day?

93. (a) Might a tender made before the law day ever be given any effect? (b) If so, what is the justification of it?

94. (a) What difference of view is to be noted in the lien and title jurisdictions, as to the effect of tender made after the law day? (b) Which is the more preferable view?

95. A made a proper tender to B the mortgagee who refused it. In a later proceeding to foreclose, should any relief be given to B? If so, against whom should the costs of the foreclosure suit be assessed?

96. Trace the early history of the right to redeem. Why did it arise in the equity and not in the law court?

97. (a) A mortgaged to B and expressly agreed that he would make no effort to redeem in case the debt should remain unpaid one year after becoming due. Has B a defense, if A seeks to redeem after the expiration of the year? (b) Has he any right on the contract?

98. (a) A mortgaged his harness store to B, a wholesaler, agreeing that he should thereafter sell only harness bought from B. Is it a binding agreement? (b) Is a breach of the agreement a defense to A's bill to redeem?

99. With what scrutiny will a court of equity examine a release of the equity of redemption?

100. A mortgaged certain lands to B, and died. Who is the proper person to redeem the lands from the mortgage?

101. (a) What are the conditions precedent to the mortgagor's redemption? (b) In addition to the payment of the debt and interest thereon, what further payments may properly be demanded by the mortgagee?

102. A, the mortgagor, died, having devised the mortgaged lands to C for life, remainder to D in fee. The personal estate was not enough to discharge the debt. In what proportions are the interests of C and D to be subjected to liability?

103. (a) What are the essential parts of a bill to redeem? (b) To what decree is a successful petitioner for redemption usually entitled? (c) Who are necessary parties plaintiff and parties defendant?

104. (a) Why do not the ordinary Statutes of Limitation apply to bills to redeem? (b) What is the principle on which courts of equity allow periods of limitation?

105. (a) May a mortgagor who does not seek to redeem the premises mortgaged, enforce an accounting by the mortgagee in possession? (b) To what extent is the mortgagee's liability to account to be reduced because of improvements made by him?

106. (a) What was the immediate occasion of the first use of the right to foreclose a mortgage? (b) What is a strict foreclosure, and what are some of the objections to it?

107. The A railroad company mortgaged its line to B and C. The line is in several states. B and C seek to foreclose the entire mortgage in one of the states. Should they be given the relief sought?

108. (a) Who are necessary parties to a suit to foreclose a mortgage? (b) Who are proper parties?

109. What are the essential parts of a complete prayer for relief in a suit to foreclose a mortgage?

110. (a) B assigned a mortgage given by A, to C. In C's suit to foreclose, what is the validity of A's defense that C gave B no consideration for the assignment? (b) May A defend by showing that B fraudulently misrepresented to A the legal effect of the mortgage?

111. How does the relief in strict foreclosure differ from that which is usually given in the modern foreclosure suit?

112. (a) What are the various steps in completing a foreclosure sale, and why is a confirmation by the court necessary? (b) Is it proper for the mortgagee to purchase at the foreclosure sale?

113. In what order are the payments to be made out of the proceeds of the sale, and to whom?

114. B sues A on a promissory note. A's defense is that when B proceeded to foreclose the mortgage given to secure the note, he had a personal judgment against A for the deficiency existing after applying the proceeds of the property sold. Is it a good defense?

115. (a) Why is it convenient to mortgagees to have powers of sale conferred on them by the mortgage instrument? (b) What is the objection to the creation of such powers of sale?

116. (a) What is the effect of a proper tender on a power of sale? (b) On what principle may a power of sale be executed after the death of the mortgagor who created it?

117. A gave a power of sale to B at the time of the mortgage. B later died. Who may exercise the power after his death?

118. What is the reason for requiring the presence of the mort-

gagee or trustee at a sale conducted in exercise of a power conferred?

119. (a) A gave a mortgage with power of sale to B. At the sale conducted by B, the Y Company in which B owned nine-tenths of the stock became purchaser. Was it a proper sale? (b) If not, how should A proceed to avoid it?

120. Why is a deed to the purchaser necessary, and what passes under it when executed by the mortgagee on whom the power was conferred?

121. B conducted a sale in the exercise of a power conferred on him and after paying all his expenses and his debt and interest, a surplus remained which was claimed by a second mortgagee, the mortgagor, and an assignee of the mortgagor. How should B proceed to determine which of the various claimants is entitled?

QUIZ QUESTIONS

INTERPRETATION OF STATUTES

(*The numbers refer to the numbered sections in the text.*)

1. The clerk of the superior court sues the city for his salary, and the defendant demurs on the ground that there is no such court, the statute which created it being unconstitutional. Can the court consider that point, or was it for the legislature to pass on in enacting the statute, or for the jury as matter of fact, the work having been performed?
2. Suit is brought in a Missouri court by an heir against the devisee of his father, contending that by the laws of France a child cannot be disinherited. Is the French law applicable, and how do you know?
3. On indictment for burglary under the statute which defined the crime to be breaking into the dwelling-house of another in the night-time with felonious intent, the defendant offered in defense to show that the place was not a dwelling-house, but an outhouse eight feet behind the house. What does "dwelling-house" mean in the statute, and why?
4. A statute provided that money obtained at gaming in excess of $10 at a single sitting may be recovered by the loser with a penalty equal to quarter of the sum taken. Defendant proved that the parties took dinner between the games; but the court instructed the jury that did not divide the sitting, since such had been held by the courts of the state from which the law was taken. Was this error?
5. Under a law rendering all wills made by unmarried

women revoked by their subsequent marriage, a married woman made a will, her husband died, she married again, and died, and her will was offered for probate. It was contended that this was not a will made by an unmarried woman. Can the word "unmarried" be interpreted out of the statute to avoid this will?

6. What is the importance of the fact that the act was entitled "An Act to Avoid Wills on Marriage"?
7. Are congressional debates available to affect the meaning of acts of Congress in cases of doubt?
8. A statute declared it a misdemeanor for any man to prescribe medical treatment for another without obtaining license from the state board of medical examiners. Is it a good defense that defendant is a woman?
9. Is the foregoing a penal or remedial statute? If remedial, can it be extended to cover this case because coming within the same mischief? If not, is there any ground on which it could be included?
10. Suit was brought to recover treble damages under the statute for malicious injury to property, and the statute was repealed while the action was pending. Is the repeal available in defense? Why?

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LEADING ILLUSTRATIVE CASES LAW OF NEGOTIABLE INSTRUMENTS

CHAPTER I.

HISTORY AND GENERAL CHARACTERISTICS.

History.

GOODWIN v. ROBARTS.

Law Reports, 10 Exchequer 337 (Eng.). 1875.

COCKBURN, C. J. * * * Bills of exchange are known to be of comparative modern origin, having been first brought into use, so far as it is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth century. The use of them gradually found its way into France, and, still later, and but slowly, into England. We find it stated in a law tract by Mr. Macleod, entitled "Specimen of a Digest of the Law of Bills of Exchange," printed, we believe, as a report to the government, but which, from its research and ability, deserves to be produced in a form calculated to insure a wider circulation, that Richard Malynes, a London merchant, who published a work called the "Les Mercatoria," in 1622, and who gives a full account of these bills as used by the merchants of Amsterdam, Hamburg, and other places, expressly states that such bills were not used in England. There is reason to think, however, that this is a mistake. Mr. Macleod shows that promissory notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. Indeed, as early as the statute of 3 Rich. II., ch. 3, bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English merchants. But the fact that a London merchant, writing expressly on the law merchant, was unaware of the use of the bills of exchange in this country,

shows that that use at the time he wrote must have been limited. According to Professor Story, who herein is, no doubt, perfectly right, "the introduction and use of bills of exchange," as indeed it was everywhere else, "seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of a custom." With the development of English commerce the use of these most convenient instruments of commercial traffic would, of course, increase; yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of Martin v. Boure, Cro. Jac. 6, in the first James I. Up to this time the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be made payable to a man and his assigns, though in some instances to bearer.

But about this period—that is to say, at the close of the sixteenth or the commencement of the seventeenth century—the practice of making bills payable to order, and transferring them by indorsement, took its rise. Hartmann, in a very learned work on bills of exchange, recently published in Germany, states that the first known mention of the indorsement of these instruments occurs in the Neapolitian Pragmatica of 1607. Slavery, cited by Mons. Nouguier, in his work, "Des Lettres de Change," had assigned to it a later date, namely, 1620. From its obvious convenience this practice speedily came into general use, and, as part of the general custom of merchants, received the sanction of our courts. At first the use of bills of exchange seemed to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not. Chitty, Bills (8th ed.), p. 13.

In the meantime, promissory notes had also come into use, differing herein from bills of exchange: That they were not drawn upon a third party, but contained a simple promise to pay by the maker, resting, therefore, upon the security of the maker alone. They were at first made payable to the bearer, but when the practice of making bills of exchange payable to order, and making them transferable by indorsement, had once become established, the practice of making promissory notes payable to order, and of transferring them by indorsement, as had been done with bills of exchange, speedily prevailed. And

for some time the courts of law acted upon the usage with reference to promissory notes, as well as with reference to bills of exchange.

In 1680, in the case of Sheldon v. Hentley, 2 Show. 160, an action was brought on a note under seal by which the defendant promised to pay to bearer £100, and it was objected that the note was void because not payable to a specific person. But it was said by the court: "Traditio facit chartam loqui, and by the delivery he (the maker) expounds the person before meant; as when a merchant promises to pay to the bearer of the note, any one that brings the note shall be paid." Jones J., said that "it was the custom of merchants that made that good."

In Bromwich v. Lloyd, 2 Lutw. 1582, the plaintiff declared upon the custom of merchants in London on a note for money payable on demand, and recovered; and Treby, C. J., said that bills of exchange were originally between foreigners and merchants trading with the English. Afterwards, when such bills came to be more frequent, then they were allowed between merchants trading in England, and afterwards between any traders whatsoever, and now between any persons, whether trading or not; and therefore the plaintiff need not allege any custom, for now those bills were of that general use that upon an indebitatus assumpsit they may be given in evidence upon the trial." To which Powell, J., added: "On indebitatus assumpsit for money received to the use of plaintiff the bill may be left to the jury to determine whether it was given for value received." In Williams v. Williams, Carth. 269, where the plaintiff brought his action as indorsee against the payee and indorser of a promissory note, declaring on the custom of merchants, it was objected on error that, the note having been made in London, the custom, if any, should have been laid as the custom of London. It was answered "that this custom of merchants was part of the common law, and the court would take notice of it ex-officio; and therefore it was needless to set forth the custom specially in the declaration, but it was sufficient to say that such a person 'secundum usum et consuetudinem mercatorum,' drew the bill." And the plaintiff had judgment.

Thus far the practice of merchants, traders and others of treating promissory notes, whether payable to bearer or order, on the same footing as bills of exchange, had received the sanc-

tion of the courts, but, Holt having become chief justice, a somewhat unseemly conflict arose between him and the merchants as to the negotiability of promissory notes, whether payable to order or to bearer; the chief justice taking what must now be admitted to have been a narrow-minded view of the matter, setting his face strongly against the negotiability of these instruments, contrary, as we are told by authority, to the opinion of Westminster Hall, and in a series of successive cases persisting in holding them not negotiable by indorsement or delivery.

The inconvenience to trade arising therefrom led to the passing of the statute of 3 and 4 Anne, c. 9, whereby promissory notes were made capable of being assigned by indorsement or made payable to bearer, and such assignment was thus rendered valid beyond dispute or difficulty. It is obvious from the preamble of the statute, which merely recites that "it had been held that such notes were not within the custom of merchants," that these decisions were not acceptable to the profession or the country. Nor can there be much doubt that by the usage prevalent amongst merchants these notes had been treated as securities negotiable by the customary method of assignment, as much as bills of exchange, properly so-called. The statute of Anne may, indeed, practically speaking, be looked upon as a declaratory statute, confirming the decisions prior to the time of Lord Holt.

We now arrive at an epoch when a new form of security for money, namely, goldsmiths' or bankers' notes, came into general use. Holding them to be part of the currency of the country as cash, Lord Mansfield and the court of king's bench had no difficulty in holding in Miller v. Race, 1 Burrows 452, that the property in such a note passes, like that in cash, by delivery, and that a party taking it bona fide, and for value, is consequently entitled to hold it against a former owner from whom it has been stolen.

In like manner it was held, in Collins v. Martin, 1 Bos. & P. 648, that where bills indorsed in blank had been deposited with a banker, to be received when due, and the latter had pledged them with another banker as security for a loan, the owner could not bring trover to recover them from the holder. Both these decisions, of course, proceeded on the ground that the

property in the bank note payable to bearer passed by delivery, that in the bill of exchange by indorsement in blank, provided the acquisition had been made bona fide.

A similar question arose in Wookey v. Pole, 4 Barn. & Ald., 1, in respect of an exchequer bill, notoriously a security of modern growth. These securities being made in favor of blank or order, contained this clause, "if the blank is not filled up, the bill will be paid to bearer." Such an exchequer bill having been placed, without the blank being filled up, in the hands of the plaintiff's agent, had been deposited by him with the defendants, on a bona fide advance of money. It was held by three judges of the queen's bench—(Bayley, J., dissentiente)—that an exchequer bill was a negotiable security, and judgment was therefore given for the defendants. The judgment of Holroyd, J., goes fully into the subject, pointing out the distinction between money and instruments which are the representatives of money and other forms of property. "The courts," he says, "have considered these instruments either promises or orders for the payment of money, or instruments entitling the holder to a sum of money, as being appendages to money, and following the nature of their principal." After referring to the authorities, he proceeds: "These authorities show that not only money itself may pass, and the right to it may arise, by currency alone, but, further, that these mercantile instruments, which entitle the bearer of them to money, may also pass, and the right to them may arise, in like manner, by currency or delivery. These decisions proceed upon the nature of the property (*i. e.*, money) to which such instruments give the right, and which is in itself current, and the effect of the instruments, which either give to their holders, merely as such, a right to receive the money, or specify them as the persons entitled to receive it."

Another very remarkable instance of the efficacy of usage is to be found in much more recent times. It is notorious that, with the exception of the Bank of England, the system of banking has recently undergone an entire change. Instead of the banker issuing his own notes in return for the money of the customer deposited with him, he gives credit in account to the depositor, and leaves it to the latter to draw upon him, to bearer or order, by what is now called a "check." Upon this state of things the general course of dealing between bankers and their

customers has attached incidents previously unknown, and these, by the decisions of the courts, have become fixed law. Thus, while an ordinary drawee, although in possession of funds of the drawer, is not bound to accept, unless by his own agreement or consent, the banker, if he has funds, is bound to pay on presentation of a check on demand. Even admission of funds is not sufficient to bind an ordinary drawee, while it is sufficient with a banker; and the money deposited with a banker is not only money lent, but the banker is bound to pay it when called for by the draft of the customer. See Pott v. Clegg, 16 Mees. & W., 321. Besides this, a custom has grown up among bankers themselves of marking checks as good for the purposes of clearance by which they become bound to one another. Though not immediately to the present purpose, bills of lading may also be referred to as an instance of how general mercantile usage may give effect to a writing which without it would not have had that effect at common law. It is from mercantile usage, as proved in evidence, and ratified by judicial decision in the great case of Lickbarrow v. Mason, 2 Term. R. 63, that the efficacy of bills of lading to pass the property in goods is derived.

It thus appears that all these instruments, which are said to have derived their negotiability from the law merchant, had their origin, and that at no very remote period, in mercantile usage, and were adopted into the law by our courts as being in conformity with the usages of trade; of which, if it were needed, a further confirmation might be found in the fact that according to the old form of declaring on bills of exchange, the declaration always was founded on the customs of merchants.

* * *

CHAPTER II.

FORMAL REQUISITES.

Writing and Signature.

TAYLOR v. DOBBINS.

1 Strange 399 (Eng.). 1716.

In case upon a promissory note, the declaration ran, that the defendant made a note, *et manu sua propria scripsit.* Exception was taken, that since the statute he should have said that the defendant signed the note, but the Court held it well enough, because laid to be wrote with his own hand, and there needs no subscription in that case, for it is sufficient his name is in any part of it. I, F. S., promise to pay, is as good as I promise to pay, subscribed F. S.

BROWN v. THE BUTCHERS' AND DROVERS' BANK.

6 Hill 443 (N. Y.). 1844.

On error from the Superior Court of the city of New York, where the Butchers' and Drovers' Bank sued Brown as the indorser of a bill of exchange and recovered judgment. The indorsement was made with a lead pencil, and in figures, thus, "1. 2. 8.," no name being written. Evidence was given strongly tending to show that the figures were in Brown's handwriting, and that he meant they should bind him as indorser, though it also appeared he could write. The Court below charged the jury that, if they believed the figures upon the bill were made by Brown, as a substitute for his proper name, intending thereby to bind himself as indorser, he was liable. Exception. The jury found a verdict for the plaintiffs below, on which judgment was rendered, and Brown thereupon brought error.

NELSON, C. J. It has been expressly decided that an indorsement written in pencil is sufficient: Geary v. Physic, 5

Barn. & Cress. 234; and also that it may be made by a mark: George v. Surrey, 1 Moo. & M. 516. In a recent case in the K. B. it was held that a mark was a good signing within the statute of frauds; and the Court refused to allow an inquiry into the fact whether the party could write, saying that would make no difference. Baker v. Dening, 8 Adol. & Ellis, 94; and see Harrison v. Harrison, 8 Ves. 186; Addy v. Grix, Ib. 504.

These cases fully sustain the ruling of the Court below. They show, I think, that a person may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intend to bind himself.

Judgment affirmed.

A Note Must Contain a Promise.

CURRIER v. LOCKWOOD.

40 Conn. 349. 1873.

An action in assumpsit upon a written instrument described as a note, with the common counts; brought originally before a justice of the peace and appealed to the Court of Common Pleas of Fairfield County, and tried in that court, upon the general issue, closed to the court, with notice that the action was barred by the statute of limitations. The suit was brought June 1, 1872.

In the special counts the plaintiff averred "that the defendant, in and by a certain writing or note, under his hand by him well executed, dated the 22d day of January, 1863, promised the plaintiffs to pay to them for value received, the sum of seventeen dollars and fourteen cents, as by the said writing or note ready in court to be shown appears."

Upon the trial the plaintiffs offered in court the following writing:

"$17.14. Bridgeport, Jan. 22d, 1863.

"Due Currier & Barker seventeen dollars and fourteen cents, value received. FREDERICK LOCKWOOD."

At the time the note was given the plaintiffs were partners under the name of Currier & Barker.

To this evidence the defendant objected, upon the ground that there was a fatal variance between the evidence offered and the

special count in the declaration, and the court excluded the same as evidence to prove the special count, but admitted it to prove an indebtedness under the common counts.

It was proved that sometime within three years before the bringing of the suit, Barker, one of the plaintiffs, met the defendant in the street, and reminded him of the note, and that the defendant said, "I will give you a ton of coal for it," and no reply being made, passed along on his way.

It was further proved that, about the time the suit was brought, the defendant came into Barker's store and said to him, "Have you that note?" or "Where is that note?" and "I wish to settle it," or words to that effect, and that Barker told him that the note was in Mr. Steven's hands and he could settle with him, and that the defendant replied, "The note is outlawed and good for nothing, and you can go ahead if you want to."

It was further proved that the note was given for clothing purchased of the plaintiffs by the defendant, which had not been paid for.

The plaintiffs claimed, first, as a matter of law, that the writing was a promissory note, not negotiable under the statute, and was not barred until seventeen years from its date; also, second, that the facts proved an acknowledgment of the debt, and a new promise, which took it out of the statute of limitations. The defendant claimed adversely to each of these claims. The court ruled adversely to the claims of the plaintiffs, and held that the debt was barred by the statute of limitations, and rendered judgment for the defendant to recover his costs.

SEYMOUR, C. J. The first question in this case is whether the writing sued upon is a promissory note within the meaning of those words in the statute of limitations. The statute is as follows: "No action shall be brought on any bond or writing obligatory, contract under seal, or promissory note not negotiable, but within seventeen years next after an action shall accrue." The instrument sued upon is as follows:

"$17.14. "Bridgeport, Jan. 22d, 1863.

"Due Currier & Barker seventeen dollars and fourteen cents, value received. FREDERICK LOCKWOOD."

Promissory notes not negotiable are by the statute above

recited put upon the footing of specialties in regard to the period of limitation, and for most other purposes such notes have been regarded as specialties in Connecticut. The instrument however to which this distinction has been attached is the simple express promise to pay money in the stereotyped form familiar to all. The writing given in evidence in this case is a due bill and nothing more. Such acknowledgments of debts are common and pass under the name of due bills. They are informal memoranda, sometimes here as in England in the form of "I. O. U." They are not the promissory notes which are classed with specialties in the statute of limitations. The law implies indeed a promise to pay from such acknowledgments, but the promise is simply implied and not expressed. It is well said by Smith, J., in Smith v. Allen, 5 Day (Conn.), 337, "Where a writing contains nothing more than a bare acknowledgment of a debt, it does not in a legal construction import an express promise to pay; but where a writing imports not only the acknowledgment of a debt but an agreement to pay it, this amounts to an express contract."

In that case the words "on demand" were held to import and to be an express promise to pay. That case adopts the correct principle, namely, that to constitute a promissory note there must be an express as contra-distinguished from an implied promise. The words "on demand" are here wanting. The words "value received," which are in the writing signed by the defendant, cannot be regarded as equivalent to the words "on demand." The case of Smith v. Allen went to the extreme limit in holding the writing then given to be a promissory note, and we do not feel at liberty to go further in that direction than the court then went.

The writing then not being a promissory note, the plaintiff's action is barred by the six years clause of the statute, unless revived by a new promise to pay.

The offer of the defendant to give a ton of coal for the note was not accepted. It was a mere offer of compromise, and clearly no acknowledgment to take the case out of the statute.

The conversation between the parties, recited in the motion, taken together as one transaction, was held by the Court of Common Pleas not to be sufficient evidence of a new promise. The result of the interview was a refusal to pay. The opening

of the conversation on the part of the defendant would seem to admit the justice of the plaintiff's demand. The expression of a wish "to settle the note" would seem to imply that it was justly due; but the word "settle" is somewhat equivocal, and taking the whole interview together, we think the Court of Common Pleas made no mistake in law in deciding as it did.

A new trial is not advised.

A Bill Must Contain An Order.

WHEATLEY v. STROBE et al.

12 Cal. 92. 1859.

This was an action of assumpsit to recover a sum of money. The facts as they appear in the opinion of the Court, are as follows:

As appears from the record in this case, Strobe was indebted to Wheatley, and Wheatley to Howel, and Howel to Wilcoxson & Co. To pay his debt Wheatley gave Howel an order on Strobe for $236, payable to bearer. This order is not set forth in the record, but is admitted by counsel to be in the following form:

"Sac City, July 18, 1857.

"MR. STROBE: Please pay the bearer of these lines two hundred and thirty-six dollars, and charge the same to my account.

"E. D. WHEATLEY."

On the 25th of July the order was presented to Strobe, and by him was verbally accepted. No acceptance in writing was made. Soon afterward Wilcoxson & Co., whose demand against Howel was in judgment, and upon which they had previously issued execution, garnished the debt, if any, due by Strobe to Howel, by virtue of this order. Subsequently Wheatley commenced the present suit against Strobe to recover the original debt. Strobe admitted the original indebtedness, but set up the order, his verbal acceptance, and the garnishment of Wilcoxson & Co., and prayed that Howel and Wilcoxson & Co. might be made parties, and he be allowed to pay the amount into Court. Wilcoxson & Co. filed a petition of intervention, setting up substantially the same facts, with the additional fact that the order was given for a debt due by Wheatley to Howel, and asserting a right to the amount of the debt by virtue of

their garnishment, and praying judgment in their favor for the same. The plaintiff demurred to the answer of Strobe; the demurrer was sustained, and, with the judgment entered thereon, the petition of intervention was denied. Defendant appealed to this Court.

FIELD, J. Upon the facts in this case the appellants make two points. *First.* That the verbal acceptance of Strobe was sufficient to render him liable to Howel upon the order of Wheatley; and, *Second.* If this be untenable, that the order operated as an equitable assignment of the demand against Strobe, which thus became subject to attachment as the property of Howel.

The first of these points cannot be sustained. The order possesses all the requisites of an inland bill of exchange. It contains a direction for the payment of money by one person to another, absolutely and at all events. As no time is specified it is to be taken as payable at sight. No further particulars than these are essential to constitute a bill of exchange. The insertion of the word "please" does not alter the character of the instrument. This is the usual term of civility and does not necessarily imply that a favor is asked: Story on Bills, § 33 and notes; 3 Kent, 74.

The order being a bill of exchange the written acceptance of Strobe was necessary to charge him as acceptor under the statute. His verbal acceptance was insufficient: Act concerning Bills of Exchange, § 6. Upon the order, therefore, he is not liable. * * * Judgment reversed.[1]

Both Bills and Notes Must Be Payable in Money.

RHODES v. LINDLY.

3 Ohio 51. 1827.

This was an action of assumpsit, upon a note of hand given by the defendant, to Hezekiah Rhodes or bearer, promising to pay fifty dollars, at a day subsequent, "in good merchantable whisky, at trade price." The declaration set forth in terms, an assignment and delivery of the note to the plaintiff, and claimed

[1] The reversal was on the second point.

to recover as bearer. The defendant demurred, and assigned as a cause of demurrer, that the note was not negotiable.

The court of common pleas in Trumbull county gave judgment for the plaintiff, and the defendant obtained this writ of error, which was adjourned here for final decision.

BY THE COURT: At the common law, this paper was not assignable; neither is it assignable under our statute. The plaintiff admits this; but claims to recover, on the ground, that being made payable to bearer, any person, who is the actual bona fide owner, may maintain the action as bearer. Were it a note for money, this position would be a correct one. But that doctrine has never been applied to executory contracts for the delivery of property, or for the performance of any particular act.

The case of Geddings v. Byington, 2 Ohio 228, decided upon the circuit, at Ashtabula, is supposed to have settled this doctrine differently. This inference is deducted, not from the point decided, but from some remarks of the judge in giving the opinion. These were only intended to apply to a note for the payment of money, made payable to a payee or bearer. It was only to that point that the attention of the court was directed in argument. The negotiable character of the note was not made a subject of inquiry by either party. The plaintiff in error claimed a reversal, on the ground that the right of the original payee did not appear, by the declaration, to have passed to the holder, by assignment, delivery, or otherwise, and that ground being considered sufficient for the purpose, the judgment was reversed without further examination. In this case, the direct question is presented, whether such a contract as this can be so transferred as to authorize a third person to maintain a suit in his own name. Our unanimous opinion is that no such right can be transferred. The judgment must be reversed, and judgment be given for the defendant.

What Is Money?

HASBROOK v. PALMER.

2 McLean 10 (U. S. Circuit Court). 1839.

OPINION OF THE COURT. This action is brought by the plaintiffs as assignees on a promissory note, payable at New

York, in New York funds or their equivalent. The defendants demur specially, and for cause of demurrer state that it is not averred in said declaration of what value the said New York funds or their equivalent in the declaration were at the time and place of payment, and that said note is not negotiable.

The Michigan statute in regard to the negotiability of promissory notes is similar to the statute of Anne, which has been generally adopted in this country. And the principal question under this demurrer is, whether the note on which this action is brought, being payable in New York funds or their equivalent, is negotiable.

The plaintiffs rely on the decision in the case of Keith v. Jones, 9 John. Rep. 120, where it was held that a note payable to A., or bearer, in "New York State bills or specie," was negotiable within the statute, upon the ground that the bills mentioned meant bank paper, which, in conformity with general usage and understanding, are regarded as cash; and, therefore, that the meaning was the same as if payable in lawful current money of the State. And also on the case of Judah v. Harris, 19 John. Rep. 144, where it was decided that a promissory note, payable at a particular place, in the bank-notes current in the city of New York, was negotiable within the statute.

And it is insisted that the promise to pay in New York funds, or their equivalent, is equivalent to an undertaking to pay in lawful current money of the State of New York. That it is generally understood New York funds means specie, or a currency equal to specie, and that the drawer of the note promises, substantially, to pay in current New York money.

In support of the demurrer it is contended that to be negotiable a note must be for the payment of money only, and this is laid down in Chitty on Bills (ed. 1839), 152. He says it is the first and principal requisite, and is established by foreign as well as English law, that a bill or note must be for the payment of money only. That it cannot be for the delivery or payment of merchandise, or other things in their nature susceptible of deterioration and loss and variation in value; nor can it be for payment in good East India bonds or for the payment of money by a bill or note: Clarke v. Percival, 2 Bar. & Adol. 660; Bul. N. P. 272.

A promissory note not payable in cash or specific articles is

not negotiable: Matthews v. Haughton, 2 Fairf. 377; Johnson v. Laird, 3 Blackf. Rep. 153.

A note payable to A. B., or order, in good merchantable whiskey, at trade price, cannot be sued by an assignee or bearer in his own name: Rhodes v. Lindley, Ohio Rep. condensed, 465.

A note for a certain sum, payable to A. or order, "in foreign bills" (meaning thereby bills of country banks), has been held not to be a good promissory note within the statute, and consequently not negotiable: Jones v. Sales, 4 Mass. Rep. 245. In the case of Lieber and Colsin v. Goodrich, 5 Cowen Rep. 186, the Court held a note payable in Pennsylvania or New York paper currency is not a promissory note for the payment of money within the statute. And in the case of McCormick v. Trotter, 10 Serg. & Raw. Rep. 94, the Court decided that a promissory note payable to A. B., or order, for five hundred dollars, in notes of the chartered banks in Pennsylvania, was not a negotiable note on which the indorsee can sue in his own name.

In South Carolina it has been decided that paper medium is not money; and that, therefore, a note payable in paper medium is not assignable within the statute of Anne and their Act; and on a verdict for the assignee of such a note judgment was arrested: Large v. Kohne, 1 McCord, 115; McElarin v. Nesbit, 2 Nott & McCord Rep. 519.

The cases cited in the 9th and 19th of John. Rep. seem not to be sustained by the current of decisions in this country and in England; and it is difficult to distinguish those cases from the decisions cited so as to maintain their consistency. If this, indeed, were practicable, it is not necessary to the decision of the question raised by this demurrer.

What is understood in this State by New York funds or their equivalent, may be a matter of doubt; nor does it seem to be of a nature which can be resolved by evidence, so far as regards the question under consideration.

The term New York funds, it is presumed may embrace stocks, bank notes, specie, and every description of currency which is used in commercial transactions. But whether is meant the funds of the State generally or of the City of New York is not clear. The presumption is in favor of the latter, but this is by no means certain. In this respect, as well as what

constitutes New York funds, the face of the note is indefinite. It is, indeed, susceptible of different interpretations, and for this reason it cannot be considered a negotiable instrument within the statute. It is not a note, in the language of the decisions, payable in money. It is payable in New York funds or their equivalent.

Now what is equivalent to New York funds? The answer is their value, their value in specie or in current paper which passes at a discount. Might not the drawer pay this note in this description of paper, making up the discount? Would not this, in the language of the contract, be equivalent to New York funds? It would be equivalent if of equal value.

The demurrer must be sustained.

Election to Require Something in Lieu of Money.

HOSSTATTER v. WILSON.

36 Barb. 307 (N. Y.). 1867.

This action was brought by the plaintiff as the owner and holder of four several promissory notes, made and signed by the defendant. The following is a copy of one of said notes:

"$55. WILLIAMSBURGH, Dec. 20th, 1859.

Four months after date, I promise to pay to the order of M. W. Wilson, fifty-five dollars, at my store, No. 134 4th Street, (or in goods on demand,) value received.

(Signed) M. W. WILSON."

Said note being indorsed in blank, "M. W. Wilson" and "Hosstatter & Henssel." The other notes bore the same date, and were in the same form, but for different amounts, and were all indorsed in blank by M. W. Wilson.

The complaint alleged that neither the plaintiff nor any other holder of said notes, or any of them, ever elected to take payment thereof in goods, as provided therein; that the same are wholly due and unpaid, and that the defendant was justly indebted to the plaintiff thereon, in the amount of $295, being the aggregate amount of said four notes, together with interest; for which sum the plaintiff demanded judgment. The defendant demurred to the complaint, on the ground that it appeared on the face thereof that it did not state facts sufficient to constitute

a cause of action. After argument, at special term, the demurrer was overruled with costs; and the defendant appealed.

INGRAHAM, P. J. The notes declared on in this action were promises to pay the amounts therein mentioned as dollars or *in goods on demand.* The complaint merely gives copies of the notes, with an averment that no holder of the notes had ever elected to take payment in goods. The defendant demurred to the complaint, on the ground that there was no cause of action stated therein. The demurrer was overruled. The decision of the questions arising on the demurrer depends upon the question whether the instrument is a promissory note. If it is, then the complaint is sufficient.

The essential requisite of a promissory note is, that it must be payable in money absolutely and without any contingency. Such payment must be precise and certain. (Chit. on Bills, 152, 9th ed. Story on Prom. Notes, sec. 22.) So a written promise to pay the bearer a certain sum of money in goods is not a valid promissory note. (Story, sec. 17, 7 John. 321, 1 Cowen, 691.) If there appears on the face of the note any contingency which would make it payable in anything other than money, then it does not possess the negotiable qualities of promissory notes, and becomes a mere contract. It is an alternative agreement to pay a sum of money or do some other act. In the present case the debtor promises to pay in money. He has no election to do anything else. If the holder chooses, he may surrender the note and receive the goods; but that rests entirely with himself, and no choice is left to the debtor.

Upon the argument, my impressions were adverse to the sufficiency of this complaint; but a late case in the court of appeals has, I think, established a contrary doctrine. In Hodges v. Shuler, 22 N. Y. 114, it was held that a note of a corporation, for a specific sum, with a fixed time for payment, and containing the condition that the holder might within a given time surrender the note, and receive stock in lieu thereof, was a promissory note. This was no other than a note for money, or, in case the holder elected within the time specified, to be paid in stock. Wright, J. says: "The instrument is a promissory note. It is for the unconditional payment of money, at a specified time, to the payee's order. It was not optional with the

makers to pay in money or stock and thus fulfill their promise in either of two specified ways: in such case the promise would have been in the alternative." And again, "although an election was given to the promisees upon a surrender of the instrument to exchange it for stock, this did not alter its character, or make the promise in the alternative, in the sense in which that word is used respecting promises to pay."

Whatever views I might otherwise entertain, of this question, I think the decision last cited covers this case and controls us in the disposition of this question.

It was said that the averment that no demand had been made for the goods, sustained the grounds taken by the defendant. Upon that point I have no difficulty. The answer to it is, that the averment is unnecessary. The matter was only available as a defense if the demand had been made and complied with. Even if the demand for the goods has been made, the debtor would not have been relieved from his obligation to pay in cash, except by delivering the goods demanded. In case of omitting to do so, the obligation to pay remained. If he had paid, the note would have been surrendered.

The judgment of the special term should be affirmed, with costs.

Effect of Statement of Transaction Which Gives Rise to Instrument.

SIEGEL, COOPER & CO. v. CHICAGO TRUST & SAVINGS BANK.

131 Ill. 569. 1890.

SHOPE, C. J. delivered the opinion of the Court.

This was an action of assumpsit, by appellee, against appellants, upon the following instrument:

$300 CHICAGO, March 5, 1887.

On July 1, 1887, we promise to pay D. Dalziel, or order, the sum of three hundred dollars, for the privilege of one framed advertising sign, size —x— inches, one end of each of one hundred and fifty-nine street cars of the North Chicago City Railway Co., for a term of three months, from May 15, 1887.

SIEGEL, COOPER AND CO.

—which was indorsed by Dalziel, the payee, to appellee, for value on the day of its execution.

The first question presented is, is this instrument negotiable?—and this question has been answered affirmatively by the Circuit and Appellate Courts. The Appellate Court having affirmed the judgment in favor of the plaintiff, the case is brought here by appeal, upon certificate of importance granted by that court.

It appears, that before the time when the privilege of advertising was to commence Dalziel forfeited any right he may have acquired to use the cars in the manner indicated, and the privilege specified never was furnished appellants; and it is insisted that the instrument is a simple contract, only, and that therefore the same defense,—failure of consideration,—is available against the indorsee of the paper for value, and before due, as might be interposed against such paper in the hands of the payee. It is also insisted, that the instrument shows, on its face, that payment depended upon a condition precedent to be performed by the payee, and therefore the indorsee took it with notice, and by the failure of the payee to perform the condition, no right of recovery exists in the indorsee. It is not contended that the indorsee had any other notice than that contained in the instrument itself, and it is apparent that at the time of its indorsement, which was the day of its execution, no right to the consideration had accrued to the makers. It is a promise to pay a certain sum of money at a day certain, for a consideration thereafter to be rendered, and depends for its validity upon the implied promise of the payee to furnish the consideration at the time and in the manner stipulated,—that is, it is a promise to pay a sum certain on a particular day, in consideration of the promise of the payee to do and perform on his part. A promise is a valuable consideration for a promise.

But the question remains, whether the statement or the recital of the consideration on the face of the instrument impairs its negotiability, and, in this instance, amounts to a condition precedent. The mere fact that the consideration for which a note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee, will not destroy its negotiability, unless it appears, through the recital, that it qualifies the promise to pay, and renders it conditional or un-

certain, either as to the time of payment or the sum to be paid. Daniel on Neg. Inst., secs. 790-797; Davis v. McCready, 17 N. Y. 320; State Nat. Bank v. Casson, 39 La. Ann. 865; Gordloe v. Taylor, 13 N. C. 458; Stevens v. Blunt, 7 Mass. 240.

In State Nat. Bank v. Casson (supra), it is said: "Plaintiff received the note before maturity, and before the failure of the consideration. Even if it were known to him that the consideration was future and contingent, and that there might be offsets against it, this would not make him liable to the equities between the defendant and the payee. It cannot affect the negotiability of a note that its consideration is to be hereafter realized, or that, from contingency, it may never be enjoyed."

The most that can be said of a recital in the instrument itself, of the consideration upon which it rests, is, that the indorsee, taking it before maturity, is chargeable with notice of the recital. Such recital, however, is not sufficient, of itself, to advise him that there was, or would necessarily be, a failure of consideration, but if, at the time of the indorsement, the consideration has in fact failed, the recital might be sufficient to put him upon inquiry, and, in connection with other facts, amount to notice. Henneberry v. Morse, 56 Ill. 394. The case at bar does not, however, fall within the rule just stated, for the assignment was made the same day the note was made, and by the terms of the recital it was apparent the payee was required to do no act till the 15th of May following,—an interval of seventy days.

There is a distinction, clearly recognized in the authorities, between an instrument payable at a particular day, and one payable upon the happening of some event; and the rule is, that where the parties insert a specific date of payment the instrument is then payable at all events,—and this, although, in the same instrument, an uncertain and different time of payment may be mentioned, as, that it shall be payable upon a particular day, or upon the completion of a house, or the performance of other contracts, and the like. McCarty v. Howell, 24 Ill. 341, and authorities supra. But the doctrine of this and kindred cases, where there are both a certain day of payment and one more or less contingent, need not be here invoked, for the time of payment in the instrument under consideration

is not made to depend upon the happening or not happening of any event, but is specific and certain, and must occur by the efflux of time, alone.

If, therefore, it be conceded, as it must, that a condition inserted in a promissory note, postponing the day of payment until the happening of some uncertain or contingent event, will destroy its negotiability and render the instrument a mere agreement, yet under the authorities, if by the instrument the maker promises to pay a sum certain at a day certain to a certain person or his order, such instrument must be regarded as negotiable, although it also contains a recital of the consideration upon which it is based, and although it further appear that such consideration, if executory, may not have been performed. Here, the money was payable, absolutely, on the first day of July, 1887,—a time when the contract for the advertising could not have been completed. If the instrument had remained the property of the payee, and upon its maturity and performance to that time, suit had been brought, it is clear that no plea of partial failure of consideration could have been sustained, for the reason that the entire term had not then expired. No analysis of the instrument itself is necessary. The most careful examination of it will fail to disclose a condition precedent to the payment of the money at the time stipulated. Nor is there anything in the recital of the consideration to put the indorsee upon inquiry at the time the indorsement was made. Indeed, it is clear that at that time no inquiry would have led to notice that Dalziel would fail to comply with his contract on the 15th of May thereafter, when the term was to commence. All that the recitals would give notice of was, that the note was given in consideration of an agreement on the part of the payee that the privilege of advertisement named should be enjoyed by the makers for three months, from May 15, 1887. Giving to the language employed its broadest possible meaning, it cannot be construed as notice to the indorsee of the future breach of the contract by Dalziel. The presumption of law would be, that the contract would be carried out in good faith, and the consideration performed as stipulated. The makers had put their promissory note in the hands of Dalziel upon an express consideration which they were thereafter to receive, and for the performance of which they had seen fit to rely upon

the undertaking of Dalziel, and we are aware of no rule by which they can hold this indorsee for value, before due and before the time of performance was to begin, chargeable with notice that the promise upon which the makers relied would not be kept and performed. Wade on Notice, § 94a; Loomis v. Maury, 15 N. Y. 312; Davis v. McCready, supra.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

The Sum Payable Must Be Certain.

DODGE v. EMERSON.

34 Me. 96. 1852.

Assumpsit, by the indorsee against the makers of a note payable to the Protection Insurance Company or order, for $271.25, with such additional premium as may arise on policy No. 50, issued at the Calais agency."

APPLETON, J. No principle of law is more fully established by authority, and the universal concurrence of the commercial world, than that to make a written promise a valid promissory note it must be for a fixed and certain, and not for a variable, amount. In France it is so determined by the Code Napoleon. It is the recognized mercantile law of continental Europe. In England and in this country it has received the sanction of repeated and well-considered adjudications: Story on Promissory Notes, § 20. Without this essential requisite, a written promise, though in terms payable to order, is to be regarded as a simple contract and not negotiable.

The defendants in this case have promised to pay two several sums; one certain and definite, the other uncertain and contingent. The defendant's liability being for both these sums, is obviously for an unascertained and indefinite amount.

It is insisted in argument that the plaintiff may abandon all claim for the additional premium, which is uncertain, and proceed only for the certain sum expressed in the contract. Undoubtedly he may take judgment for any sum less than the amount due, and in that mode abandon a portion of his legal claims, but that still leaves the contract in its original state, and can in no way affect its legal construction. He could not

erase the clause relating to the additional premium, without thereby making such an alteration in the instrument declared on as would discharge the defendants.

In Smith v. Nightingale, 2 Stark., R. 375, the promise was to pay the payee sixty-five pounds, and all other sums that may be due him, and it is claimed for the plaintiff, to whom the interest in the contract had passed by indorsement, that he might disregard the latter clause and recover on the certain sum set forth in his contract as indorsee, but the Court decided otherwise: Davis v. Wilkinson, 10 Adol. & El. 98.

The inquiry is made by the counsel for the plaintiff, whether the clause providing for the payment of an additional sum, introduced after the promise to pay the sum fixed and certain, controls that sum so as to make it in any event uncertain. The amount due to the plaintiff is uncertain. Whether the contract is to be regarded as a promise to pay one sum, which shall be the aggregate composed of a certain and of an uncertain sum, the amount of which is to be ascertained at some subsequent time, or a promise to pay two sums, one fixed and the other uncertain, is perfectly immaterial. In either case there is no precise and ascertained amount due by the contract, and it cannot be regarded as a promissory note. If it was not in its origin, it cannot be made one by any abandonment, which the plaintiff may deem it advisable to make of any portion of the sum due him. The contract declared on not being in its character negotiable, the action cannot be maintained by the present plaintiff.

Plaintiff nonsuit.

Time of Payment Must Be Certain.

SHAW v. CAMP.

160 Ill. 425. 1896.

CARTWRIGHT, J., delivered the opinion of the court:

Appellee filed a claim in the County Court of Piatt county, against the estate of Edward Swaney, deceased, and the claim was rejected. In the Circuit Court, on appeal, there was a trial by a jury and a verdict for the claimant for $852.50, upon which judgment was entered. The judgment was affirmed by the

Appellate Court and a certificate of importance granted, under which the case is brought to this court. On the trial the claimant offered in evidence the instrument upon which his claim was founded, together with proof of the signature of the deceased. The instrument was as follows:

$750.00 BEMENT, ILL., Dec. 27, 1890.

After my death date I promise to pay E. Hanson Camp, or order, the sum of $750, without interest at per cent. per annum from date, value received."

Following the above there was a power of attorney, in the usual form, to confess judgment, and the signature of Edward Swaney. To the introduction of this instrument objection was made and overruled, and it is insisted that the ruling was wrong, for the reason that the instrument was not a promissory note. It is conceded that a promissory note may be made payable on the death of a certain person, or at a fixed time thereafter, or on demand after such death; but it is claimed that this instrument was not payable at a time fixed, and that the words "after my death date" should be construed to mean some uncertain time after that event. We do not regard the instrument as subject to the objection made. It did not become due until the death of the maker, which was an event certain to occur, but by its terms it became due at once after the occurrence of that event. There is nothing in the language to indicate that the money was to be paid at some uncertain time after the maker's death. The objection was properly overruled.

Payee Must Be Certain.

BROWN v. GILMAN.

13 Mass. 158. 1816.

Action of assumpsit on the following writing:

"Boston, 15th May, 1810.

"Good for one hundred and twenty-six dollars on demand.

GILMAN & HOYT."

PARKER, C. J., delivered the opinion of the Court. The question in this case is whether the plaintiff can recover without showing any title to the promise declared upon; or any relation or connection with the debtor, from which a presumption might

be drawn, that the promise declared on was made to him. We put out of the case the circumstances proved at the trial, which probably had some influence in producing the nonsuit. Those circumstances were proper for the consideration of the jury, if it were necessary to give them any weight We determine altogether upon the character of the paper, upon the production of which the plaintiff is willing to rest his cause.

It is not a negotiable promissory note. If it were, and had the name of the promisee on the back, the possession of it would be sufficient prima facie evidence of the plaintiff's title.

It is not a note payable to bearer, which would be sufficient evidence of a promise to pay the holder unless suspicion was thrown upon his title by the maker.

It is not then any contract known in the law which *ex proprio vigore* constitutes a promise to whomsoever shall produce it.

Its legal effect is nothing more than that of a memorandum between the parties to it to operate as a promise to pay money, as a receipt for money, or as proof of a sum of money to be accounted for, according to the evidence offered, to show the intention of both parties when it is made. On a count for money lent, money had and received, etc., it would be conclusive evidence of so much due, unless the party signing it should prove that it was given with a different intent. The present plaintiff has not shown that it was *given to him.* It may have been picked up in the street, or he may have purloined it from the rightful owner.

Authorities have been read to show that where a contract in writing has been made and signed, but the name of the party contracted with omitted, the omission may be supplied by extrinsic evidence. Of this we have no doubt where the name was omitted by mistake or a wrong name inserted. And the authorities go no further. This paper was never intended to contain the name of any one but the signer. It was a personal acknowledgment between him and the person to whom it was delivered. That person alone can maintain an action upon it.

It is not expedient to widen the field of negotiable paper. Certainly none can be considered as such but that which has acquired the quality by statute, by usage, or by the terms of the contract; and this paper, in the form in which it is now sued, has not the sanction of either of these sources of authority.

A contract expressed in this form, "I. O. U.," was held in England not to be a promissory note, until an evasion of the stamp duties caused a different determination.

Much learning has been shown in the argument, by the counsel on both sides, but the case does not seem to require it; since, according to known rules and the common understanding of mercantile contracts, this imports no promise to the holder without evidence to show that it was actually given to him, or at least some subsisting connection shown, from which that fact might be fairly inferred.

The motion to set aside the nonsuit is overruled.

Must Contain Words of Negotiability.

MAULE v. CRAWFORD.

14 Hun 193 (N. Y.). 1878.

Appeal from a judgment in favor of the plaintiff entered upon a verdict directed by the Court, and an order denying a motion for a new trial made upon the minutes of the justice and the exceptions.

The action was brought upon a promissory note in the following words and figures:

"April 1, 1875.

"Eight months after date we promise to pay to Mr. George Harse the sum of two hundred and seventy-five dollars, for value received.

"$275.00" "John Crawford,
"Sarah Crawford."

The defendant's answer was as follows:

"1. Alleges for a first separate and distinct defense that the note mentioned in the complaint, and upon which this action is brought, was given for a loan of two hundred and fifty dollars upon which the said George Harse wrongfully, unlawfully, and corruptly reserved the sum of twenty-five dollars as usurious interest or bonus, for the loan or use of the said sum of two hundred and fifty dollars for the period of eight months, specified in the said note.

"2. And for a second separate and distinct defense, the

defendant alleges that before this action there was paid on account of said note the sum of one hundred and seven dollars."

Upon the trial the first defense was stricken out, on the ground that it was not alleged that the alleged usurious interest or bonus was reserved in pursuance of an agreement to that effect.

GILBERT, J. The county Judge erred in ruling that a payment upon the note in a suit before the transfer thereof to the plaintiff, did not bind the latter without notice. The reverse is the established rule of law. The statute, 1 R. S. 768, § 1, defines what shall give to a promissory note the quality of negotiability. It must be payable to another person or his order, or to the order of another person, or to the bearer. The note in suit was payable to George Harse only, and was, therefore, not negotiable. The plaintiff took it subject to all equities existing between the original parties, for an assignee of a chose in action stands in no better position than his assignor, in respect to anything which occurred before the assignment.

I think also the court erred in striking out the defense of usury. The plaintiff should have demurred. Lathrop v. Godfrey, 3 Hun, 742; National Bank of the Metropolis v. Orcutt, 48 Barb. 256. That part of the answer was neither sham nor frivolous. On the contrary I think it is by no means clear that it should have been held bad on demurrer.

It is averred that a note for $275 was given for a loan of $250, and that the payee thereof, wrongfully, unlawfully and corruptly reserved the sum of $25 as usurious interest for the loan of said sum of $250 for the period of eight months. Proof of a loan of $250 and a demand by the lender of a note for $25 more than the sum loaned, as compensation for, or interest upon the same, and a compliance with such demand by the borrower, certainly would have warranted the jury in finding that a usurious contract to that effect was made. It is not necessary that a formal agreement, either verbal or written, should be set forth in so many words. It is enough to allege the facts as they occurred, and if such facts justify the inference of a usurious contract, the answer ought to be held sufficient: Merch. Ex. Nat. Bank v. Com. Warehousing Co., 49 N. Y. 638. No stricter rule of pleading should be administered in a case

of usury than in any other case. In the case of Nat. Bank v. Lewis, 10 Hun, 468, it was held that the answer did not allege an agreement between the parties. We might doubt the correctness of that construction of the answer in that case, but there can be no question that in pleading usury, a usurious agreement must be in substance averred. No demurrer to the answer in this case having been interposed, we think it should have been held sufficient to admit the evidence of the usury which was offered.

The order denying a new trial, and the judgment must be reversed with costs.

CHAPTER III.

DELIVERY, CONSIDERATION, INTERPRETATION.

Delivery.

FEARING v. CLARK.

16 Gray 74 (Mass.). 1860.

Action of contract on a promissory note for $600, made by the defendant, dated July 4, 1857, and payable in one year after date to the order of one Joseph Lambrite, and by him indorsed. The defendant in his answer denied the making and indorsement of the note declared on, but admitted that he signed such a note, and averred that he put it into the hands of third parties to be delivered to Lambrite, on the happening of contingencies which never did happen, and that neither the defendant nor those parties, nor any one else, by his authority or consent, ever delivered the writing to Lambrite or to any other person as the defendant's promissory note.

At the trial in the superior court, the plaintiff proved the signatures of the maker and indorser; and there was evidence that, on the 6th of July, 1857, the note was in Lambrite's possession, and was indorsed and delivered by him to the plaintiff as collateral security for the payment in six months of $2,000, of which $900 was still due from Lambrite to the plaintiff at the time of the trial, and that the plaintiff took the note without any knowledge of the circumstances under which it had been given.

Rockwell, J., allowed the defendant to introduce evidence of the facts alleged in his answer, against the objection of the plaintiff that they would constitute no defense to the action unless proved to have been known to the plaintiff when he took the note, and instructed the jury "that if they should find that the writing copied in the declaration was never delivered by the defendant, or any person authorized by him so to deliver it, to the payee, or to any person for his use, but that he obtained

possession of it without the assent or knowledge of or authority from the defendant, and, having obtained such possession without right or authority, put his name upon the back of it, and delivered it to the plaintiff, then and in that case it never became the negotiable note of the defendant, and the defendant was entitled to their verdict." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

BIGELOW, C. J. The defendant proved no facts at the trial which constituted a valid defense to the note declared on as against the plaintiff, who is a bona fide holder for value without notice. The rule is well settled that, when a note is transferred by a party to whom it is intrusted without authority or fraudulently, it will be valid as against the maker in the hands of a holder who takes it bona fide without notice of the special circumstances under which the note came into the possession of the payee or agent of the maker who puts it in circulation. In such case, the maker or indorser who places it in the hands of another, for the purpose of being used in a particular way or for a special object, takes the risk of its being used in a different way, and cannot refuse to pay it to any bona fide holder into whose hands it may come. Chit. Bills (10th ed.) 198; Sweetser v. French, 2 Cush. 309, 48 Am. Dec. 666. It is undoubtedly true that, as between the original parties to a note or those who take it with notice, it is essential that there should have been a delivery of the note by the maker to take effect as a contract. In this sense, delivery is included in the allegation of making. But the rule is qualified and limited as between the maker and a bona fide holder. In such case, a valid delivery can be made by any person to whom the maker has given the note in such form as to enable him to hold himself out as absolute owner of the note. The case of Putnam v. Sullivan, 4 Mass. 45, 3 Am. Dec. 206, is a strong one on this point. There the notes were delivered to a clerk to be used for special purposes only, and it was held that a delivery by the clerk, whether through deception practiced on him, or by a voluntary violation of the trust reposed in him, must be deemed in law, as against a bona fide holder, a delivery by those who were liable on the notes. The rule is different in regard to a deed, bond, or other instrument placed in the hands of a third

person as an escrow, to be delivered on the happening of a future event or contingency. In that case, no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it bona fide without notice. It therefore makes the consequences, which follow from the negotiation of promissory notes and bills of exchange through the fraud, deception, or mistake of those persons to whom they are intrusted by the makers to fall on those who enabled them to hold themselves out as owners of the paper jure dispondendi, and not on innocent holders who have taken it for value without notice.

Exceptions sustained.

Consideration.

SWIFT v. TYSON.

16 Pet. 1 (41 U. S.). 1842.

STORY, J., delivered the opinion of the court.

This cause comes before us from the Circuit Court of the southern district of New York, upon a certificate of division of the judges of that Court.

The action was brought by the plaintiff, Swift, as endorsee, against the defendant, Tyson, as acceptor, upon a bill of exchange dated at Portland, Maine, on the first day of May, 1836, for the sum of one thousand five hundred and forty dollars, thirty cents, payable six months after date and grace, drawn by one Nathaniel Norton and one Jairus S. Keith upon and accepted by Tyson, at the city of New York, in favor of the order of Nathaniel Norton, and by Norton endorsed to the plaintiff. The bill was dishonored at maturity.

At the trial the acceptance and endorsement of the bill were admitted, and the plaintiff there rested his case. The defendant then introduced in evidence the answer of Swift to a bill of discovery, by which it appeared that Swift took the bill before it became due, in payment of a promissory note due to him by Norton and Keith; that he understood that the bill was

accepted in part payment of some lands sold by Norton to a company in New York; that Swift was a bona fide holder of the bill, not having any notice of anything in the sale or title to the lands, or otherwise, impeaching the transaction, and with the full belief that the bill was justly due. The particular circumstances are fully set forth in the answer in the record; but it does not seem necessary farther to state them. The defendant then offered to prove, that the bill was accepted by the defendant as part consideration for the purchase of certain lands in the State of Maine, which Norton and Keith represented themselves to be the owners of, and also represented to be of great value, and contracted to convey a good title thereto; and that the representations were in every respect fraudulent and false, and Norton and Keith had no title to the lands, and that the same were of little or no value. The plaintiff objected to the admission of such testimony, or of any testimony, as against him, impeaching or showing a failure of the consideration, on which the bill was accepted, under the facts admitted by the defendant, and those proved by him, by reading the answer of the plaintiff to the bill of discovery. The judges of the Circuit Court thereupon divided in opinion upon the following point or question of law: Whether, under the facts last mentioned, the defendant was entitled to the same defence to the action as if the suit was between the original parties to the bill, that is to say, Norton, or Norton and Keith, and the defendant; and whether the evidence so offered was admissible as against the plaintiff in the action. And this is the question certified to us for our decision.

There is no doubt that a bona fide holder of a negotiable instrument for a valuable consideration, without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an endorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support. As little doubt is there, that the holder of any negotiable paper, before it is due, is not bound to prove

that he is a bona fide holder for a valuable consideration, without notice; for the law will presume that, in the absence of all rebutting proofs, and therefore it is incumbent upon the defendant to establish by way of defence satisfactory proofs of the contrary, and thus to overcome the prima facie title of the plaintiff.

In the present case, the plaintiff is a bona fide holder without notice, for what the law deems a good and valid consideration, that is, whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. * * *

It becomes necessary for us, therefore, upon the present occasion to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying, that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language), that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due; we are prepared to say, that receiving it in payment of or as security for a pre-existing debt, is according to the known usual course of trade and business. And why upon principle should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and ante-

cedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuity to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine would become of that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts.

This question has been several times before this Court, and it has been uniformly held, that it makes no difference whatsoever as to the rights of the holder, whether the debt for which the negotiable instrument is transferred to him is a pre-existing debt, or is contracted at the time of the transfer. In each case he equally gives credit to the instrument. The cases of Coolidge v. Payson, 2 Wheaton, R. 66, 70, 73, and Townsley v. Sumrall, 2 Peters, R. 170, 182, are directly in point.

In England the same doctrine has been uniformly acted upon. As long ago as the case of Pillans and Rose v. Van Meirop and Hopkins, 3 Burr. 1664, the very point was made and the objection was overruled. That, indeed, was a case of far more stringency than the one now before us; for the bill of exchange, there drawn in discharge of a pre-existing debt, was held to bind the party as acceptor, upon a mere promise made by him to accept before the bill was actually drawn. Upon that occasion, Lord Mansfield, likening the case to that of a letter of credit, said, that a letter of credit may be given for money already advanced, as well as for money to be advanced in future; and the whole court held the plaintiff entitled to recover. From that period downward there is not a single case to be found in England in which it has ever been held by the court, that a pre-existing debt was not a valuable consideration, sufficient to protect the holder, within the meaning of the general rule, although incidental dicta have been sometimes relied on to establish the contrary, such as the dictum of Lord Chief Justice Abbott in Smith v. De Witt, 6 Dowl. & Ryland, 120, and De la Chaumette v. The

Bank of England, 9 Barn. & Cres. 209, where, however, the decision turned upon very different considerations.

Mr. Justice Bayley, in his valuable work on bills of exchange and promissory notes, lays down the rule in the most general terms. "The want of consideration," says he, "in toto or in part, cannot be insisted on, if the plaintiff or any intermediate party between him and the defendant, took the bill or note bona fide and upon a valid consideration." Bayley on Bills, p. 499, 500, 5th London edition, 1830. It is observable that he here uses the words "valid consideration," obviously intending to make the distinction, that it is not intended to apply solely to cases, where a present consideration for advances of money on goods or otherwise takes place at the time of the transfer and upon the credit thereof. And in this he is fully borne out by the authorities. They go farther, and establish, that a transfer as security for past, and even for future responsibilities, will, for this purpose, be a sufficient, valid, and valuable consideration. Thus, in the case of Bosanquet v. Dudman, 1 Starkie, R. 1, it was held by Lord Ellenborough, that if a banker be under acceptances to an amount beyond the cash balance in his hands, every bill he holds of that customer's, bona fide, he is to be considered as holding for value; and it makes no difference though he hold other collateral securities, more than sufficient to cover the excess of his acceptances. The same doctrine was affirmed by Lord Eldon in Ex parte Bloxham, 8 Ves. 531, as equally applicable to past and to future acceptances. The subsequent cases of Haywood v. Watson, 4 Bing. R. 496, and Bramah v. Roberts, 1 Bing. New Ca. 469, and Percival v. Frampton, 2 Cromp. Mees. & Rose, 180, are to the same effect. They directly establish that a bona fide holder, taking a negotiable note in payment of or as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties. And these are the latest decisions, which our researches have enabled us to ascertain to have been made in the English courts upon this subject.

In the American courts, so far as we have been able to trace the decisions, the same doctrine seems generally but not universally to prevail. In Brush v. Scribner, 11 Conn. R. 388, the Supreme Court of Connecticut, after an elaborate review of the

English and New York adjudications, held, upon general principles of commercial law, that a pre-existing debt was a valuable consideration, sufficient to convey a valid title to a bona fide holder against all the antecedent parties to a negotiable note. There is no reason to doubt, that the same rule has been adopted and constantly adhered to in Massachusetts; and certainly there is no trace to be found to the contrary. In truth, in the silence of any adjudications upon the subject, in a case of such frequent and almost daily occurrence in the commercial states, it may fairly be presumed, that whatever constitutes a valid and valuable consideration in other cases of contract to support titles of the most solemn nature, is held a fortiori to be sufficient in cases of negotiable instruments, as indispensable to the security of holders, and the facility and safety of their circulation. Be this as it may, we entertain no doubt, that a bona fide holder, for a pre-existing debt, of a negotiable instrument, is not affected by any equities between the antecedent parties, where he has received the same before it became due, without notice of any such equities. We are all, therefore, of opinion, that the question on this point, propounded by the Circuit Court for our consideration, ought to be answered in the negative; and we shall accordingly direct it so to be certified to the Circuit Court. * * * Whereupon it is now here ordered and adjudged by this court, that an answer in the negative be certified to said Circuit Court.

Incomplete Instruments.

SNYDER v. VAN DOREN, IMP.

46 Wis. 602. 1879.

TAYLOR, J. This action is brought to recover the amount of a promissory note bearing date June 5, 1875, payable to the plaintiff or bearer, two years after date, with interest at ten per cent. per annum. The note on its face purports to be signed by all the defendants in the following order: A. J. Van Doren, J. D. Van Doren, I. O. Van Doren.

The note is the joint note of the makers.

The evidence shows that the appellant, I. O. Van Doren, and J. D. Van Doren, signed the note in blank something over a year before the date of the same. The note signed by the appel-

lant was a printed form, blank as to date, amount, time of payment, rate of interest and payee, and there was also a blank to be filled for the purpose of making it a joint or several note. The evidence also shows that the note was so signed in blank by the appellant for the purpose of enabling J. D. Van Doren to raise money on the same for his own use, and that the appellant was simply an accommodation maker. It also shows that before the note was negotiated or delivered to the plaintiff, it was filled up and signed as it appeared at the trial; and for the purposes of this case it must be held that the plaintiff knew that the name of A. J. Van Doren was not signed to the note at the time it was signed by the appellant and J. D. Van Doren. The evidence also shows that there was no express authority given by the appellant that the note might be so signed before the same was negotiated.

Upon this evidence the learned counsel for the appellant insists that there can be no recovery against the appellant. Counsel admits that, by signing the note in blank for the accommodation of J. D. Van Doren, the appellant authorized him to add the date, amount, time of payment, rate of interest and name of payee, to make it a joint and several or joint or several note, and to make it negotiable or otherwise; but denies that by so doing he authorized him to procure any third person or persons to sign the same as joint or several makers with him.

The real question to be determined in this case is, whether a person who signs a note in blank as maker, for the accommodation of the person to whom he delivers it, must be held, as between him and a bona fide holder for value, to have impliedly authorized the person to whom the same is delivered, to have the same signed by another party or parties as joint makers with him. We think, both upon principle and authority, that the person for whose accommodation such note is signed, may, before the same is negotiated by him, procure the same to be so signed by another person or persons, without vitiating such note in the hands of a bona fide holder. If the party signing the note in blank expressly stipulates that the same shall not be signed by any other person, there is probably no doubt but that the note would be void in the hands of any one who took the same so signed by another, knowing that the accommodation maker had expressly stipulated against such further signature.

We think the rule is, that a party who signs a note in blank makes the person to whom it is delivered for negotiation his agent, not only for the purpose of filling the blanks in the note, but to do any other thing necessary to make the note so signed accomplish the purpose for which it was intended, with the limitation that he shall not insert in such note any contract or stipulation not usually found in a promissory note. It was not even argued by the learned counsel for the appellant, that in such case the party holding the note could not, for the purpose of negotiating the same, have it indorsed by a third person or persons, or have a third person guaranty the payment of the same by a written guaranty on the back thereof; and it seems to us that if he may do that, there is no objection to his accomplishing the same purpose by having such third person sign the same as a joint or several maker.

It is not a question of alteration of the note, but a question of implied agency on the part of the holder. The note in the hands of the holder, before negotiation by him, is not a binding contract between him and the accommodation maker. To have any validity as a contract, it must be negotiated by the holder; and until such negotiation takes place, the contract is imperfect, and may be filled up and perfected in any manner, by such holder, which is not inconsistent with the implied agency given by the accommodation maker. There can be no doubt that the holder might fill up the same with an amount, date and time of payment, and then alter the same in either of these respects before he negotiated the same, without vitiating the note in the hands of a bona fide holder. The person to whom the same was delivered in blank being agent of the maker for the purposes above specified, any alteration made by him in that respect, before negotiation, would no more affect the validity of the note than if made by the maker himself. Chitty on Bills of Exchange, 215. The cases cited below show the extent of the implied agency of the party to whom a bill of exchange or promissory note, signed in blank, is delivered. There are two classes of cases illustrative of the subject. First, the cases in which a party writes his name on a piece of blank paper, and delivers it to another person with intent that such other person may use such name as the drawer of a bill of exchange or maker of a promissory note, or where the name is so written as to indicate that the

writer is to be the indorser of a promissory note or the acceptor of a bill of exchange, and with the understanding that a promissory note or bill of exchange, may be written on such blank paper. In such cases, the courts hold that a note or bill of exchange, for any amount, in favor of any person, and payable at any time, may be written over such name, and, when negotiated, a bona fide holder may recover on the same; and that in such case it is no defense that the party to whom the same was delivered in blank, exceeded his actual authority. The same rule applies in the case of a person signing as an indorser or acceptor. In the case of Russel v. Langstaffe, 2 Douglas R., 514, Lord Mansfield says: "The indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said, 'Trust Gally to any amount, and I will be his security.' It does not lie in his mouth to say the indorsements were not regular." In the case of Violett v. Patton, 5 Cranch (U. S.), 142, which was the case of an indorsement upon a blank piece of paper, Chief Justice Marshall says: "The objection certainly comes with a very bad grace from the mouth of Violett. He indorsed the paper with the intent that the promissory note should be written on the other side; and that he should be considered as the indorser of the note. It was the shape he intended to give the transaction; and he is now concluded from saying or proving that it was not filled up when he indorsed it. It would be to protect himself from the effect of his promise by alleging a fraudulent combination between himself and another to obtain money for that other from a third person. * * *"

The second class of cases are those in which the party sought to be charged as maker, indorser or acceptor, signs or indorses a note or bill of exchange in blank, either written or printed, but not filled up so as to make it a perfect note or bill at the time it is so signed. In these cases, the same rule as above stated is applicable, with, perhaps, the limitation that no material alteration can be made in those parts of the note or bill which were printed or written thereon at the time it was signed or indorsed in blank. In cases of this kind, the rule as to the extent of the implied agency of the person to whom the same is delivered in blank, is very clearly and briefly stated in Bank v. Neal, 22 How. (U. S.), 107, as follows: "When a party to a negotiable instrument intrusts it to the custody of another,

with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument; and, as between such party and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody; or, in other words, it is the act of the principal, and he is bound by it." The same rule has been laid down in nearly every case in which the question has been raised. Mitchell v. Culver, 7 Cow. 336; Bank v. Kimball, 10 Cush. 373; Montague v. Perkins, 22 Eng. L. & Eq. 516; Davidson v. Lanier, 4 Wall. 457; Orrick v. Colston, 7 Grat. 189; Schultz v. Astley, 29 Eng. C. L. 414; Schryver v. Hawkes, 22 Ohio St. 308; Redlich v. Doll, 54 N. Y. 238; Cruchley v. Clarance, 2 M. & S. 90; Crutchly v. Mann, 5 Taunt. 529; Ives v. Bank, 2 Allen 236; Insurance Co. v. Leavenworth, 30 Vt. 11; Douglas v. Scott & Fry, 8 Leigh 43; Elliott v. Chesnut, 30 Md. 562; Brummel v. Enders, 18 Grat. 897; Bell v. Bank, 7 Blackf. 458; Holland v. Hatch, 11 Ind. 500, 501; Daniel on Negotiable Instruments, secs. 143, 144; Story on Bills of Exchange, sec. 222, and notes.

These cases, and many more which might be cited, fully establish the rule as above stated; and they all hold that the implied agency of the person to whom the note or bill signed in blank is delivered, is of the most general and absolute nature, and that he may bind such signer to any extent, so long as he does not change the nature of the instrument indicated by the blank so signed, or erase or change the parts of the instrument which were written or printed at the time of such signing. * * *

We can see no reason why a party who signs his name to a blank note or bill, and delivers the same to a third person, for the purpose of enabling such person to raise money thereon for his own use, should be heard to object to the payment of such note or bill, because it is afterwards, and before the same is negotiated, signed by another person or persons. By his signature he is, in law, presumed to have intended to hold himself bound to any person who might thereafter receive the same for value, for any sum, payable at any time and place, and to any person or persons, at the discretion of the party to whom he delivers the same for negotiation. In the language of Chief

Justice Tindal, above quoted: "It can make no difference to him, either as to the extent of his liability, or in any other respect, whether the bill or note be signed by another person or not." He certainly cannot be injured thereby. As he has given the credit of his name for the purpose of enabling the person to whom he gives it to raise money upon the instrument to which it is affixed, he must be held to have authorized such person to make use of the same in any way which may be reasonably necessary to accomplish the purpose for which it was given, with the limitations above noticed, that he shall not change the nature of the contract he has signed, nor increase the liability which, in law, he has assumed by such signature. All the cases hold that a note signed in blank may be filled up with the name of any person as payee, and may be made payable to order or bearer, and consequently may be indorsed by the person to whose order it is made payable, either at or before its negotiation; and if the holder may make the instrument available for the purpose for which it is given, by procuring the indorsement of a third person, which will give the instrument greater credit, there does not seem to be any good reason why such greater credit may not be given to it by adding the name of another maker. It does not seem to us that the law will permit this defendant, who has voluntarily signed the note in controversy, and voluntarily made himself liable to the holder for the full amount thereof, to say that he will not pay the same because some other person has also bound himself for its payment.

This case does not raise the question as to what might be the effect of procuring an additional accommodation maker to a note which had been signed in blank, at the same time, or by mutual agreement, by two or more joint accommodation makers, who, in case of payment by one or more of them, would be liable to contribution as between themselves; and this decision is limited by the facts to the case of a single accommodation maker signing alone, without any express agreement that the same shall be signed by any other; and in such case we hold that, unless expressly prohibited by the person signing as such maker, the holder to whom the same is delivered may, before negotiation, procure the same to be signed by another accommodation maker, or makers, without vitiating the note or bill, and that the same may be enforced by a bona fide holder for value, even though he

knew that the same had been so signed in blank by the party against whom he seeks to enforce the same. Mere knowledge of the fact that the bill was signed in blank by the defendant, will not defeat a recovery on the same, even when the person to whom the same was delivered has exceeded his authority or appropriated the note or bill to a purpose for which it was not intended. To defeat a recovery in case of misappropriation or excess of authority expressly given, knowledge of such misappropriation, or the limited authority, must be brought home to the holder who seeks to recover on the same. Story on Bills of Exchange, sec. 222, and notes; Daniel on Negotiable Instruments, sec. 143, and notes. * * *

By the Court.—The judgment of the circuit court is affirmed.

CHAPTER IV.

ACCEPTANCE.

Purpose and Necessity.

LUFF v. POPE.

5 Hill 413 (N. Y.). 1843.

On the merits it appeared that the action was brought upon the following instrument:

"New York, Dec. 9, 1838.

"Thirty days after sight pay Henry Pope or his order sixty-six dollars and ninety-seven cents, and place the same to account of yours, "ABM. BELL.

"To MR. MARTIN LUFF, New York."

The draft was presented to the defendant for acceptance two days after its date, and was duly protested by a notary for non-acceptance. The plaintiff proved that he had a demand against Bell, and on calling for payment Bell said he had funds in the hands of the defendant, and thereupon made this draft for the amount of the plaintiff's demand. On presenting the draft the defendant said he would pay it by the 1st of February or the 1st of March; but he refused to accept it, or to make any promise in writing. The plaintiff gave evidence tending to show that the defendant had funds of Bell in his hands sufficient to pay the bill, and the defendant gave rebutting evidence. The defendant moved for a non-suit, on the ground that there was no acceptance in writing, and because the defendant positively refused to accept the bill. The motion was denied by the Justice, on the ground that he did not think this a bill of exchange within the meaning of the statute. He said it was known to all the parties that the instrument was drawn on a particular fund, and he regarded it as a transfer of a chose in action. The jury were afterward charged that if this was a bill of exchange within the common acceptation of business men the plaintiff could not

recover for want of a written acceptance. But if it was only an order or instrument in writing to transfer so much of the specific fund of Bell in the hands of Luff as would pay Bell's debt to Pope, then it was not within the statute, and the defendant was liable, provided he had funds. The jury found for the plaintiff as before mentioned. Judgment of affirmance having been perfected in the Superior Court, the defendant in the Marine Court brought error.

BRONSON, J. * * * On the merits, the judgment of the Marine Court was clearly erroneous, and should have been reversed. There is no color for the argument that the instrument on which the plaintiff sued was not a bill of exchange. A bill of exchange is a written order or request by one person to another for the payment, absolutely and at all events of a specified sum of money to a third person. Now what have we here? Bell requests Luff, thirty days after sight, to pay a specified sum of money to Pope. It is payable absolutely, and without reference to any particular fund; and if it be not a bill of exchange the wit of man cannot devise one. The Justice thought it was not a bill, but only "an order or instrument in writing," because it was said at the time, and the proof tended to establish the fact, that Luff had funds in his hands belonging to Bell. It would be enough to say that a written instrument which is perfectly plain and explicit on its face cannot be changed into something else by anything which the parties said at the time of making it, nor by any inquiry into extrinsic facts. It must speak for itself. But the notion that there cannot be a bill of exchange where the drawee has funds, if it be not entirely new, cannot date back further than 1836. It contradicts the very theory, and all the right use of a bill of exchange, which is always supposed to be drawn on funds. Incalculable mischief has resulted from the modern practice of drawing without funds, which is little better than a fraudulent use of the instrument. And although such bills have been tolerated, we have not yet gone so far as to make it unlawful to pursue the old-fashioned honest course of drawing where the means for payment have already been provided.

Whether the payee takes the bill in satisfaction of a debt due from the drawer, or advances the money for it, cannot be a mat-

ter of any importance as between him and the drawee. It does not affect the nature of the instrument.

The statute requires that the acceptance should be in writing: 2 R. S. 768, § 6. Here there is not only the want of any writing, but the defendant positively refused to accept, and the bill was protested for non-acceptance. And yet the defendant has been held liable. An examination of this case in all its facts would go very far to conform the policy of the statute. But it is enough that we cannot repeal it, and until that is done the plaintiff cannot recover. He must take his remedy against the drawer; and if Bell has any money in the hands of the defendant, which is very questionable, he must sue for it. It is a chose in action which cannot be transferred so as to give the assignee a right to sue in his own name, except in the form of an accepted bill of exchange. To give a parol promise to pay the effect of a written acceptance of the bill would be no better than a device to get around the statute and defeat all the valuable ends which it was designed to accomplish. If Quin v. Hanford, 1 Hill, 82, does not support, it certainly does not conflict with this doctrine. In Harrison v. Williamson, 2 Edw. Rep. 430, 438, the Vice-Chancellor said: "A bill of exchange has not the effect of an assignment of the money for which it is drawn in the hands of a drawee; unless, perhaps, where it is drawn upon a particular fund, and then, indeed, by the law merchant, it loses its character as a bill of exchange." He undoubtedly alluded to a class of cases, some of which are cited in Quin v. Hanford, where an order, either not payable in money or else drawn on a particular fund, has, after acceptance or promise of payment, been allowed to operate as an equitable assignment of the fund. And see Morton v. Naylor, 1 Hill 583. This has been done upon a very liberal construction of the acts of the parties for the advancement of justice. But those cases have nothing to do with a bill of exchange proper, which is an instrument of a peculiar nature, and governed by its own laws. Although it is used for the purpose of transferring funds, and has that effect in the result, it never operates as an assignment to the payee of any particular money in the hands of the drawee. If the latter accepts the bill, the payee or other holder may sue upon the contract of acceptance. But if the drawee refuse to accept, there is no contract between him and

the holder, and no action will lie. And this is so although the drawee had funds, and ought, in justice to the drawer, have paid the bill.

We think all these judgments are erroneous, and they must therefore be reversed.

Judgments reversed.

Form of Acceptance.

SPEAR v. PRATT.

2 Hill 582 (N. Y.). 1842.

Assumpsit, tried at the Onondaga Circuit, in September, 1841, before MOSELEY, C. J. The action was against the defendant, Frederick Pratt, as acceptor of a bill of exchange, payable to the order of the plaintiffs. The defendant's name was written across the face of the bill; and the question was, whether this was such an acceptance as is required by the statute. It was admitted that the defendant, at the time of the acceptance, was a resident of this State. His counsel insisted at the trial that the acceptance was insufficient to charge him, but the Circuit Judge, being of a different opinion, directed the jury to find for the plaintiffs, which they accordingly did; and the defendant's counsel, having excepted, now moved for a new trial upon a bill of exceptions.

COWEN, J. Any words written by the drawee on a bill, not putting a direct negative upon its request, as "accepted," "presented," "seen," the day of the month, or a direction to a third person to pay it, are prima facie a complete acceptance, by the law merchant: Bayley on Bills, 163, Am. ed. of 1836, and the cases there cited. Writing his name across the bill, as in this case, is a still clearer indication of intent, and a very common mode of acceptance. This is treated by the law merchant as a written acceptance—a signing by the drawee. "It may be," says Chitty, "merely by writing the name at the bottom or across the bill," and he mentions this as among the more usual modes of acceptance: Chitty on Bills, 320, Am. ed. of 1839.

It is supposed that the rule has been altered by 1 R. S. 757, 2d ed., § 6. This requires the acceptance to be in writing, and

signed by the acceptor or his agent. The acceptance in question was, as we have seen, declared by the law merchant to be both a writing and signing. The statute contains no declaration that it should be considered less. An indorsement must be in writing and signed; yet the name alone is constantly holden to satisfy the requisition. No particular form of expression is necessary in any contract. The customary import of a word, by reason of its appearing in a particular place and standing in a certain relation, is considered a written expression of intent quite as full and effectual as if pains had been taken to throw it into the most labored pariphrase. It is said the revisers, in their note, refer to the French law as the basis of the legislation which they recommended; and that the French law requires more than the drawee's name—the word accepted at least. That may be so; but it is enough for us to see that both the terms and the spirit of the Act may be satisfied short of that word, and more in accordance with the settled forms of commercial instruments in analogous cases. The whole purpose was probably to obviate the inconveniences of the old law, which gave effect to a parol acceptance.

New trial denied.

Acceptance on Separate Paper.

COOLIDGE ET AL v. PAYSON ET AL.

2 Wheaton 66 (U. S.); Condensed Reports U. S., vol. 4, p. 25.
1817.

MARSHALL, C. J. This suit was instituted by Payson & Co., as indorsers (indorsees) of a bill of exchange drawn by Cornthwaite & Cary, payable to the order of John Randall, against Coolidge & Co. as the acceptors. * * *

The question of law which arises from the charge given by the court to the jury is this: Does a promise to accept a bill amount to an acceptance to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favor of a person who takes it for a pre-existing debt?

In the case of Pillans & Rose v. Van Mierop & Hopkins (1765), 3 Burr., 1663, the credit on which the bill was drawn

was given before the promise to accept was made, and the promise was made previous to the existence of the bill. Yet in that case, after two arguments, and much consideration, the Court of King's Bench (all the judges being present and concurring in opinion) considered the promise to accept as an acceptance.

Between this case and that under consideration of the court, no essential distinction is perceived. But, it is contended, that the authority of the case of Pillans & Rose v. Van Mierop & Hopkins is impaired by subsequent decisions.

In the case of Pierson v. Dunlop et al., Cowp., 571, the bill was drawn and presented before the conditional promise was made on which the suit was instituted. Although, in that case, the holder of the bill recovered as on an acceptance, it is supposed that the principles laid down by Ld. Mansfield, in delivering his opinion, contradict those laid down in Pillans & Rose v. Van Mierop & Hopkins. His lordship observes, "it has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, 'he will duly honor it,' is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer."

If the case of Pillans & Rose v. Van Mierop & Hopkins had been understood to lay down the broad principle that a naked promise to accept, amounts to an acceptance, the case of Pierson v. Dunlop certainly narrows that principle so far as to require additional circumstances proving that the person on whom the bill was drawn, was bound by his promise, either because he had funds of the drawer in his hands, or because his letter had give credit to the bill, and induced a third person to take it.

It has been argued, that those circumstances to which Ld. Mansfield alludes, must be apparent on the face of the letter. But the court can perceive no reason for this opinion. It is neither warranted by the words of Ld. Mansfield, nor by the circumstances of the case in which he used them. "The mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance unless accompanied with circumstances," etc. The answer must be "accompanied with cir-

cumstances;" but it is not said that the answer must contain those circumstances. In the case of Pierson v. Dunlop, the answer did not contain such circumstances. They were not found in the letter, but were entirely extrinsic. Nor can the court perceive any reason for distinguishing between circumstances which appear in the letter containing the promise, and those which are derived from other sources. The great motive for construing a promise to accept, as an acceptance, is, that it gives credit to the bill, and may induce a third person to take it. If the letter be not shown, its contents, whatever they may be, can give no credit to the bill; and if it be shown, an absolute promise to accept will give all the credit to the bill which a full confidence that it will be accepted can give it. A conditional promise becomes absolute when the condition is performed.

In the case of Mason v. Hunt, 1 Doug., 296, Ld. Mansfield said, "there is no doubt but an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawee. If one man, to give credit to another, makes an absolute promise to accept his bill, the drawer, or any other person, may show such promise upon the exchange to get credit; and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor."

What is it that "the drawer, or any other person, may show upon the exchange?" It is the promise to accept—the naked promise. The motive to this promise need not, and cannot be examined. The promise itself, when shown, gives the credit; and the merchant who makes it is bound by it.

The cases cited from Cowper, Cowper 571, and Douglass are, it is admitted, cases in which the bill is not taken for a pre-existing debt, but is purchased on the credit of the promise to accept. But in the case of Pillans v. Van Mierop, the credit was given before the promise was received or the bill drawn; and in all cases the person who receives such a bill in payment of a debt, will be prevented thereby from taking other means to obtain the money due to him. Any ingredient of fraud would, unquestionably, affect the whole transaction; but the mere circumstance that the bill was taken for a pre-existing debt had

not been thought sufficient to do away with the effect of a promise to accept.

In the case of Johnson and another v. Collings, 1800, 1 East, 98, Ld. Kenyon shows much dissatisfaction with the previous decisions on this subject; but it is not believed that the judgment given in that case would, even in England, change the law as previously established.

In the case of Johnson v. Collings, the promise to accept was in a letter to the drawer, and is not stated to have been shown to the indorser. Consequently, the bill does not appear to have been taken on the credit of that promise. It was a mere naked promise, unaccompanied with circumstances which might give credit to the bill. The counsel contended, that this naked promise amounted to an acceptance; but the court determined otherwise. In giving his opinion, Le Blanc, J., lays down the rule in the words used by Ld. Mansfield, in the case of Pierson v. Dunlop.

Ld. Kenyon said, in that case, that "this was carrying the doctrine of implied acceptances to the utmost verge of the law; and he doubted whether it did not even go beyond it. In Clarke and others v. Cock, 4 East, 57, the judges again express their dissatisfaction with the law as established, and their regret that any other act than a written acceptance on the bill had ever been deemed an acceptance. Yet they do not undertake to overrule the decisions which they disapprove. On the contrary, in that case, Clarke v. Cock, they unanimously declared a letter to the drawer promising to accept the bill, which was shown to the person who held it, and took it on the credit of that letter, to be a virtual acceptance. It is true, in the case of Clarke v. Cock, the bill was made before the promise was given, and the judges, in their opinions, use some expressions which indicate a distinction between bills drawn before and after the date of the promise; but no case has been decided on this distinction; and in Pillans & Rose v. Van Mierop & Hopkins, the letter was written before the bill was drawn.

The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept, as an acceptance, is that credit is thereby given to the bill. Now, this credit is given as entirely by a letter written before the date of the bill as by one written afterwards.

It is of much importance to merchants that this question should be at rest. Upon a review of the cases which are reported, this court is of opinion, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is if shown to the person who afterwards takes the bill on the credit of the letter, a verbal acceptance binding the person who makes the promise. This is such a case. There is, therefore, no error in the judgment of the Circuit Court, and it is affirmed with costs.

Judgment affirmed.

Who May Accept.

DAVIS v. CLARKE.

6 Queen's Bench 16 (Eng.). 1843.

Assumpsit. The first count stated that "one John Hart," on the 8th day of March, 1838, "made his bill of exchange in writing and directed the same to the defendant, and thereby required the defendant to pay to him or his order 100*l.*," value received, at twelve months after date, which had elapsed before the commencement, etc.; "and the defendant then accepted the said bill, and the said John Hart then indorsed the same to plaintiff;" averment of notice to defendant, promise by him to pay plaintiff, and that he did not pay.

There was also a count on an account stated.

The first plea denied the acceptance; the second the promise; the third alleged a discharge of the defendant by the Insolvent Debtor's Court.

The replication joined issue on the first two pleas, and traversed the discharge alleged in the third; on which traverse issue was joined.

On the trial, before PARKE, B., at the Essex Summer assizes, 1843, a written paper, in the following terms, was given in evidence on behalf of the plaintiff.

"£100. "London, 8th March, 1838.

"Twelve months after date pay to me or my order one hundred pounds, value received.

"To Mr. John Hart. JOHN HART."

Across the face of this instrument was written the following:

"Accepted.

"H. J. Clarke.

"payable at 319 Strand."

This writing across the face was proved to be the defendant's handwriting.

No other evidence being produced, the learned baron directed a non-suit. In Michaelmas term, 1843, Petersdorff obtained a rule nisi for a new trial.

DENMAN, C. J. There is no authority, either in English law or the general law merchant, for holding a party to be liable as acceptor upon a bill addressed to another. We must take it on this instrument that the defendant is different from the party to whom it is addressed. Polhill v. Walter, 3 B. & Ad., 114, and Jackson v. Hudson, 2 Camp., 447, are authorities showing that the defendant here cannot be sued as acceptor. In Jackson v. Hudson, Lord Ellenborough treated an acceptance by a party not addressed as "contrary to the usage and custom of merchants."

PATTESON, J. No previous case seems to be exactly like this. In Jackson v. Hudson, 2 Camp., 447, there was one acceptance by the party to whom the bill was addressed, prior to the acceptance by the defendant. In Gray v. Milner, 8 Taunt., 739, no party was named in the address; and I must say that the decision in that case appears to me to go to the extremity of what is convenient. It may be considered as having been decided on the ground that the acceptance was not inconsistent with the address, so that the acceptor might be deemed to have admitted himself to be the party addressed. But here another person, the drawer himself, is named in the address. I do not know that a party may not address a bill to himself, and accept, though the proceeding would be absurd enough. Then it is said that the defendant is estopped: but that cannot be supported where the instrument shows, on its face, that he cannot be the acceptor.

WILLIAMS, J. The only question is, whether the defendant is such an acceptor as is described in the declaration; that is of

a bill of exchange directed to him. No doubt this can be so only where he is the drawee; but here the bill is not addressed to the defendant at all. This is therefore not an acceptance within the custom of merchants.

COLERIDGE, J. The safe course is to adhere to the mercantile rule that an acceptance can be made only by the party addressed, or for his honor. Here the last is not pretended; and the first can not be presumed. If the John Hart addressed is different from the John Hart who draws, there is still not acceptance; if the same, then the instrument is a promissory note and not a bill of exchange.

Rule. Discharged.

CHAPTER V.

NEGOTIATION AND INDORSEMENT.

What Constitutes a Negotiation.

HULL v. CONOVER'S EXECUTORS.

35 Ind. 372. 1871.

DOWNEY, C. J. This suit was commenced by William Conover against the appellant, before a justice of the peace, where there was judgment for the defendant. The plaintiff appealed to the Circuit Court, where the death of William Conover was suggested, and his executors made parties plaintiffs in his stead. There was judgment in the Circuit Court for the plaintiffs, from which the defendant appealed to this Court.

The first point presented to us is, that the cause of action is insufficient. It consists of the following note:

"$150.00. Covington, June 15, 1868.

"Eighteen months after date I promise to pay to the order of Hiram Abdill one hundred and fifty dollars, value received, without any relief from valuation or appraisement laws. Interest from date six per cent.

"DANIEL HULL."

There is no indorsement of the note by Abdill to William Conover, or to the appellees, and there is, therefore, nothing to show any right in him or them to maintain the action. See Well v. Trotter, 4 Blackf. 12; Vandagrift v. Tate, Ib. 174; Hamilton v. Ewing, 6 Blackf. 88; McDonald's Treat. 68, 69. This is not a mere defect of parties.

The Judgment is reversed, with costs, and the cause remanded.

Indorsement in the Form of Assignment.

HALL v. TOBY.

110 Pa. St. 318. 1885.

Action by D. B. Toby as indorsee under the following instrument and assignment:

"$551.50. Warren, Aug. 18, 1879.

"For value received I promise to pay Wm. Toby, or order, five hundred and fifty-one $^{50}/_{100}$ dollars with interest.

ORRIS HALL.

[On the back of this paper was the following transfer or assignment]:

For value received I hereby assign, transfer and set over to D. B. Toby all my right, title, interest and claim in the within note.

WM. TOBY,
TIONESTA, Nov. 21, 1881. D. B. TOBY.

PER CURIAM.—This note was negotiable. It contained an absolute and unconditional promise to pay to Wm. Toby or order the sum specified. As no time of payment was therein expressed, the law adjudges the money to be payable immediately. A right of action accrued at once and would be barred by the Statute of Limitations at the expiration of six years thereafter. The note had all the essential language to constitute a promissory note.

The legal right of action thereon would have passed by indorsement and delivery. For purpose of transfer the assignment on the back of this note passed the legal title.

Indorsement Must Be Written on the Instrument.

FRENCH v. TURNER.

15 Ind. 59. 1860.

WORDEN, J. * * * The first count states in substance, that on November 6, 1852, one John Bodle executed and delivered to Abel C. Pepper, a mortgage on certain land, therein described, to secure the payment of $1,100, evidenced by ten promissory notes of that date, each for $110; one payable in a year from date, and one maturing each year thereafter until they all become due, with interest payable annually. That in September, 1854, Pepper assigned and transferred the mortgage and notes, by indorsement on the mortgage, to the defendant, Turner. That Turner, in January, 1858, for value received, transferred the mortgage and notes to the plaintiff, by indorse-

ment in writing on the mortgage. The mortgage and notes, together with the assignment, are set out. The assignment from Turner to the plaintiff, on the mortgage, is as follows, viz.:

"For value received, I hereby assign the within mortgage and notes, therein described, to John J. French.

"January 2, 1858. (Signed) MOSES TURNER."

It is averred that the note which became due on November 6, 1858, and the interest on the other not due, remain due and unpaid. * * *

The first count is evidently based upon the supposition that the defendant is liable as an indorser of the notes. This, however, is not the case. In order to render him thus liable, the indorsement of the notes must have been made "thereon" (1 R. S., 1852, p. 378), or perhaps, "on another paper annexed thereto (called in French *Allonge*), which is sometimes necessary when there are many successive indorsements to be made." Story on Bills, § 204. See also Rex v. Bigg, 1 Strange, 18; Arnot v. Symonds, 85 Pa. St., 99; Moxon v. Pulling, 4 Camp., 50; Young v. Glover, 3 Jurist (N. S.), 637; Badgley v. Votrain, 68 Ill., 25.

The indorsement in question, made upon the mortgage, refers to the notes as being therein described, and is not upon the notes, or upon any paper attached to them. Such an assignment could not operate to transfer the legal title to the notes. It would convey an equitable title, authorizing the assignee, under our code, to sue thereon in his own name, but it does not place the assignor in the condition of a legal indorser. By such an assignment, the assignor does not warrant the solvency of the maker of the notes. It is no more effectual for that purpose than a parol assignment would be, an assignment made by the delivery of the notes. The case is analogous to the transfer of a bill payable to bearer, by delivery. "If it is payable to the bearer, then it may be transferred by mere delivery. But, although it may be thus transferred by mere delivery, there is nothing in the law which prevents the payee of a bill, payable to himself or bearer, from transferring it, if he chooses, by indorsement. In such a case, he will incur the ordinary liability of an indorser, from which, in the case of a mere transfer by delivery, he is ordinarily exempt. On the transfer of a bill, payable to the bearer, by delivery only, without indorsement, the person making it ceases

to be deemed a party to the bill; although he may in some cases incur a limited responsibility to the person to whom he immediately transfers it, founded upon particular circumstances, as, for example, upon his express or implied guaranty of its genuineness and his title thereto. Story on Bills, § 200.

The defendant not being liable upon the notes as indorser thereof it follows, that the first count is bad, and the demurrer thereto was properly sustained. * * *

The demurrers, we think, were correctly sustained, and the judgment must be affirmed.

The judgment is affirmed with costs.

Restrictive Indorsement.

CLAFLIN v. WILSON.

51 Ia. 15. 1879.

BECK, C. J. I. The petition alleges that defendant Wilson made to plaintiff three promissory notes, and executed a mortgage to secure their payment; that the note first falling due was by plaintiff, in the ordinary course of business, indorsed for collection, and by Wilson, or by some one for him, duly paid, and that defendant Davis, claiming that he had bought the first note, instituted an action to foreclose the mortgage and recovered a decree thereon and caused the lands to be sold upon an execution. He and his attorney in the case became purchasers, and received a certificate of purchase from the sheriff. Plaintiff alleges that he did not transfer the note to Davis nor authorize any one to do so for him, and had no knowledge of his claim until about the time the suit was commenced, and that Wilson is now insolvent. The relief prayed for is that the foreclosure proceedings on the note and the sale thereunder be set aside, and that the mortgage be foreclosed for the amount due upon the two notes last falling due, which are still plaintiff's property.

The answer of defendant Davis admits the foreclosure proceedings referred to in the petition, and alleges that he bought the note in good faith and for value. Other averments of the petition are denied.

II. The evidence establishes the following facts: Plaintiff

sent the note through a bank to another banking house for collection. It was indorsed by plaintiff in blank, and by the bank to whom he delivered it to the bank receiving it "for collection." Neither of the banks were authorized to transfer the note; their power was limited to its collection. The second bank, or its successor in business, received the amount due upon the note from Davis, and delivered to him the note. Davis understood the transaction as being a purchase of the note, and the banker of whom he received it had the same understanding. But Davis is chargeable with notice that the banker with whom he had the transaction was not authorized to transfer or sell the note. The indorsement upon it expresses that it was transferred to him for collection. The law will not permit him to plead ignorance of the extent of the authority of the holder who delivered it to him. Upon this point there can be no controversy.

It is an elementary rule, which need not be here supported by authority, that a note indorsed for collection cannot be transferred by one receiving it under such indorsement to another who has notice of the limitation upon the authority of the holder. Davis cannot, therefore, be regarded as a purchaser of the note, so as to cut off any right or equity of plaintiff.

* * *

Affirmed.

Qualified Indorsement.

WATSON v. CHESIRE.

18 Ia. 202. 1865.

This is a joint action, against John and Wesley Chesire and John M. Griffith. The facts, necessary to an understanding of the case, are as follows: John and Wesley Chesire sold, May 15, 1858, certain land in Mills County to one Moore, receiving, for part of the purchase-money, his note, secured by a mortgage on a portion of the land sold.

Afterward, January 20, 1860, the Chesires traded or sold the note and mortgage of Moore (which note was dated May 15, 1858, was for the sum of $743, payable one year after date, with ten per cent. interest) to the defendant Griffith, receiving in payment or exchange ninety acres of land, a mare and a

heifer, variously estimated by the witnesses as being worth from $250 to $400, and upwards. The Chesires indorsed to Griffith the note and mortgage, without recourse to them.

Afterward, about April, 1860, Griffith traded or exchanged the Moore note and mortgage to the plaintiff, Watson, for certain land, also indorsing the same, without recourse.

Watson sues the Chesires and Griffith on the indorsement. The nature of the pleadings and questions raised will appear in the opinion. Verdict and judgment for the defendants, and plaintiff appeals.

DILLON, J. The first error assigned by the plaintiff is, that "the Court erred in sustaining the defendants' demurrer to the first count of the petition." This makes it essential to set out the substance of this count with accuracy.

It commences by alleging that John and Wesley Chesire held and owned the Moore note and mortgage, describing them; that, January 20, 1860, the said Chesires, for a good and valuable consideration (but not alleging what), sold and assigned said note to their co-defendant, Griffith, whereby they falsely warranted the said note to be genuine, unpaid and unsatisfied in any way; that afterward Griffith, assignee as aforesaid, sold and assigned said note to the plaintiff for a good and valuable consideration, whereby he, Griffith, falsely warranted, etc., as above; that plaintiff relied upon said warranties and paid Griffith for said note; that the said note, at the time the same was assigned by Chesires to Griffith, and by Griffith to the plaintiff "had been fully paid, extinguished, and nothing was due thereon from the said Moore to the defendants or either of them;" whereby "the defendants fraudulently deceived the plaintiff, to his damage" in the amount of said note. Copies of these assignments are set forth, showing that they were made "without recourse." The first was an assignment in full by J. and W. Chesire to "John M. Griffith or order, without recourse." The next was in blank, as follows: "Without recourse. John M. Griffith."

To this the Court sustained a demurrer, both in behalf of the Chesires and of Griffith.

We will consider the case, with respect to the Chesires, separately and first.

Upon consideration, we think the demurrer was rightly sustained.

It is only by treating this count as founded upon the indorsement, that the plaintiff's action against the Chesires has any color or plausibility.

There is, except through the indorsement, no privity between the plaintiff and the Chesires. The latter sold the note to Griffith, and not to the plaintiff. The plaintiff purchased of Griffith, not of the Chesires. No transaction is alleged between the plaintiff and the Chesires. Hence, the plaintiff's right to sue the latter, if it exists at all, must exist by virtue of the contract of indorsement.

Now if this count be treated as one ex contractu upon the indorsement, it is not maintainable, because the indorsement, on its face, negatives and rebuts any personal liability on the part of the Chesires. This is the object and effect of an indorsement "without recourse."

Such an indorsement transfers title, but stipulates for exemption from the ordinary responsibility of an indorser. It will not, however, protect the assignor from liability over from fraud and misrepresentation in the assignment of the note. In point, see Welch v. Lindo, 7 Cranch, 159; 2 Curtis' ed., 496; Epler v. Funk, 8 Pa. St. (8 Barr) 468, 469; Prettyman v. Short, 5 Har. (Del.) 360; Richardson v. Lincoln, 5 Metc. 201; Rice v. Stearns, 3 Mass. 225; Waite v. Foster, 33 Maine, 424; Goupy v. Harden, 7 Taunt. 159, per DALLAS, J.; Chitty on Bills, 218, 225, 235; Story on Notes, § 146; Lyons v. Miller, 6 Grat. (Va.) 427.

Suppose it to be true that, in the transfer of the Moore note by Chesires to Griffith, the latter was deceived and defrauded. This would give Griffith his right of action against the former. Suppose it to be true, also, that the plaintiff was deceived and defrauded by Griffith. This would give him a right of action against the latter. He could not sue the Chesires for the fraud they practiced upon Griffith.

So that the reasoning drives us back to the point at which we started, viz., the plaintiff cannot sue Chesires ex contractu, having had no transaction with them except upon the indorsement. If the first count is treated as being founded upon that, it fails, because the indorsement itself not only does not create,

but expressly avoids, a cause of action. (*Vide* authorities above cited.)

The case presents the question What, in the absence of special contract, are the obligations of the transferrer of negotiable paper, who indorses it without recourse? It seems to us that the obligations of a transferrer of such paper, by indorsement without recourse, are substantially the same as those of a transferrer of such paper when payable to bearer by delivery merely.

It is a clear and well-settled doctrine, that such a transfer does not make the party liable as indorser. When he indorses paper without recourse, or transfers it (if payable to bearer or if indorsed in blank) by delivering merely, without putting his name upon it, he ceases to be a party to the paper. He cannot be made liable as a party to or upon the instrument.

There may be a liability in such cases, but it arises upon the transaction, upon the facts of the case, to be asserted in an action for the original consideration of its value, or for fraud practiced, and not upon the indorsement or upon the paper transferred. * * *

If the foregoing views are correct, it follows that the plaintiff, holding simply the indorsement of the Moore note "without recourse," could not sue the Chesires on the indorsement. His remedy, if he could not make out a case upon the facts, would be a special one against Griffith, of whom he purchased the note, and to whom he made payment therefor. So Griffith's remedy would be against the Chesires. Under our statute, it may be that Griffith might specially assign his cause of action against Chesires to the plaintiff; but the mere indorsement of the note without recourse would not have this effect. Such an indorsement operates simply to transfer the title to the note—not an independent cause of action. The demurrer as to the first count of the petition was, beyond doubt, properly sustained as to the Chesires.

And if we are right in considering it as being intended as one upon the indorsement, and not as one intended and adapted to recover the consideration paid for the note, it was also properly sustained as to Griffith.

Affirmed.

CHAPTER VI.

HOLDER IN DUE COURSE AND DEFENSES.

Transfer Before Maturity—Installment Paper.

VINTON v. KING.

4 Allen 562 (Mass.). 1862.

Writ of entry to foreclose a mortgage. The defense was that the note and mortgage were obtained by duress and fraud, and were given for an illegal consideration. For the purpose of obtaining a decision upon the questions of law arising in the case, Allen, C. J., directed a verdict for the plaintiff, in the superior court, upon evidence which is sufficiently stated in the opinion; and the defendant alleged exceptions.

METCALF, J. The mortgage, under which the plaintiff claims possession of the premises demanded in his writ, was given to secure payment of a note, dated April 26, 1858, of the following tenor: "Two years after date, by instalments of $53 in every six months after this date, until fully paid, I promise to pay Peter Bruyett, or bearer, the sum of two hundred and twelve dollars and interest in manner above stated. John King." This note, though payable by instalments, was negotiable, 11 M. & W. 374, and was transferred and the mortgage assigned to the plaintiff, about three months after the first instalment was overdue and unpaid. This action was commenced on the 30th of May, 1859, after the second instalment was made payable. And if the plaintiff is entitled to any judgment, it is only to a conditional judgment for possession; to-wit, unless the defendant pay to him, within the time specified by statute, such sum as shall be found due on the mortgage. Rev. Sts. c. 107, sec. 5, and Gen. Sts. c, 140, sec. 5. If the court find that nothing is due on the mortgage, the plaintiff cannot have judgment.

In an action brought by a mortgagee against his mortgagor, on a mortgage given to secure payment of a note, the defendant may show the same matters in defence (the Statute of Limita-

tions excepted, 19 Pick. 535) which he might show in defence of an action on the note. If, therefore, this action were by the mortgagee, Bruyett, instead of his assignee, the plaintiff, the defendant might successfully defend, by showing that the note and mortgage were obtained from him by duress, and the plaintiff does not deny that the same defence may be made against him, if, when the note was transferred to him, it was dishonored by non-payment of the first instalment—it being admitted law, that he who takes a note after it is due takes it subject to all objections and equities to which it was liable in the hands of him from whom he takes it, and to the same defences, in a suit against the maker, which the maker might set up in an action against him by the payee; that the circumstance that a note is overdue makes it incumbent on the party receiving it to satisfy himself that it is a good one, and that if he omit so to do, he must stand in the situation of him who was the holder at the time it was due. Bayley on Bills (2d Amer. ed.), 133, 544. Chitt. Bills (12th Amer. ed.), 247, 248; (10th Amer. ed.), 216-218. 3 Kent Com. (6th ed.), 90. Gold v. Eddy, 1 Mass. 1. American Bank v. Jenness, 2 Met. 289. Andrews v. Pond, 13 Pet. 79. Tucker v. Smith, 4 Greenl. 415. But the ground assumed by the plaintiff is, that in this case the note had not, within the rule of law on this subject, come to maturity, and was not overdue and dishonored before it was transferred to him, because the time for the payment of the last three instalments had not then come. This ground is not maintainable. As to the first instalment of $53 in six months, and interest on $212, the note had come to maturity and was overdue and dishonored when the plaintiff took it; and as to the amount of that instalment, it is not to be doubted that the defendant may make the same defence against the plaintiff which he might have made against the payee. And we are of the opinion that he may make the same defence to the whole note. The note is a single contract to pay $212 in four half-yearly instalments, and the plaintiff took it with notice on its face that, as to the first instalment, the defendant might have a justifiable cause for withholding payment, whatever that cause might be; whether a cause which affected that instalment only —as a release thereof by the payee, or a legal set-off against him to the amount thereof—or a cause which, between him and the payee, vitiated the whole note, as want or failure of con-

sideration, unlawful consideration, fraud or duress. And if the payee had sued for the recovery of the first instalment, before the second was made payable, the defendant might have defeated the action, by showing that the note was wholly void; and a judgment for him, on such ground of defence, would have been conclusive against the maintenance, by the payee, of a subsequent action to recover the other instalments. Black River Savings Bank v. Edwards, 10 Gray, 387.

The case of Clark v. Pease, 41 N. H. 414, to which we were referred by the plaintiff, would have been an authority in his favor, if he had received the note before it was dishonored, and had shown that he took it bona fide, and paid a valuable consideration for it. The authorities are numerous, that against such an indorsee or bearer, the fact that the note was originally obtained by duress is not a legal defence.

Exceptions sustained.

When Paper Payable on Demand Is Overdue.

PAINE v. CENTRAL VERMONT R. CO.

14 Fed. 269. 1882.

WHEELER, D. J. The note on which this suit is brought was given for money lent, was payable on demand with interest, and was to stand against assessments on the subscription of the person to whom it was originally made payable to the defendant's capital stock. It came to the hands of the plaintiff between three and four months after it was made. Assessments on that subscription large enough to cover the note were made and stood against that person before the transfer of the note to the plaintiff; the balance of the assessments was paid by him, so that the amount due on the assessments exactly equaled the note at the time the plaintiff took it. The note was to be given up when the stock certificates should be delivered; but the note was in the hands of the plaintiff, and the certificates were delivered to the subscriber on his assurance that he would procure the note and give it up.

The evidence by which these facts as to the assessments were proved was objected to, and it is argued that it was not admis-

sible to affect the note, and that without it there would be no defense to the note. There is no question but that parol evidence is inadmissible to alter, contradict, or vary a written instrument, in an action upon the instrument as claimed by the plaintiff, but that rule is not applicable to this proof. This evidence did not vary the note nor its obligation. It recognized the note as a valid instrument according to its terms, but showed an obligation from the holder to an equal amount to be set off against the note. There is no fair question but that the evidence is admissible if the facts established by it would affect the note in the hands of the plaintiff. At the time the plaintiff took the note it had not been demanded; and if it had been it would not have been honored but by making the offset, according to the understanding. The plaintiff took it for value as security for a loan actually advanced. If he cannot recover upon it he may lose some of the money lent; if he does recover upon it the defendant may lose the assessment. The question arises here as to which, under the law, should stand this risk of loss. The plaintiff took the title of the person he dealt with to the note, and acquired all the rights of that person upon the note. Those rights were to have the note set off against the assessments. If the plaintiff's rights are no greater than that he cannot recover. He has no greater rights, unless the defendant is bound to stand to the note as due in the hands of the plaintiff on account of his position in respect to it as induced by the act of the defendant in leaving the note outstanding.

If the act of the defendant in leaving it outstanding induced him to part with his money without fault, the defendant ought to make the note good to him, as it appeared to be; but if he was in fault in taking it he has no ground to hold the defendant to make it good to him. As the note was on demand, it was due presently. It would have to be presented and paid according to the usual course of business, if free from defenses. The time would come when, if outstanding, the presumption would be that it had been demanded, or that a demand had been omitted because known to be unavailing. If this time was such as to make it reasonable to suppose that the note was outstanding because it would not be paid, then the plaintiff was in fault in taking it without inquiring of the maker. Whether the lapse of time was such is a question of law. On this question the author-

ities are not uniform, but no case shows that more than three months can reasonably be overlooked. Business paper would usually be adjusted within that time, if regular. In this case the circumstance that the holder of the note was borrowing on disadvantageous terms, would lead directly to the inquiry why he did not resort to the maker of the note when it was due on demand. Had the plaintiff inquired, the presumption is that he would have learned the truth, and both would have been saved from loss. As he did not inquire, it seems more just, as well as lawful, that he should take the risk brought about by the failure to inquire, than that the defendant should.

It has been argued with much plausibility that there was nothing perfected to meet the note until the stock certificates were delivered, long after the plaintiff had it, and that, therefore, it was valid when the plaintiff took it. But this argument is not well founded in fact. The person who took the note was not a purchaser of stock, but a subscriber for stock. The assessments made the debt due from him, and it was that debt which met the note. He could not resist payment of assessments because the stock certificates were not delivered. The delivery of the certificates did not pay the note, nor create the debt which would pay it. That was merely the occasion when the note was to be delivered up. Amer. Bank v. Jenness, 2 Metc. 288. The president of the defendant held out encouragement to the plaintiff that the defendant would pay this note if the plaintiff did not succeed in collecting the debt to which it was collateral; and this fact has been relied upon by the plaintiff as a waiver of the defense now set up. There was no new consideration for any undertaking in this respect. It does not appear that the plaintiff lost anything by reason of what took place on this subject. He has the same right against his debtor since that he had before, and the same rights against the defendant.

The plaintiff must stand upon his rights acquired by taking the note at the time and under the circumstances when he took it. The note was at that time overdue, and he took it with the same obligation that it carried in the hands of the person whom he took it of. This principle that overdue paper is taken subject to all defenses is so well settled in the law as to require no citation of authorities to support it.

Judgment for defendant.

Good Faith.

GOODMAN v. SIMONDS.

20 How. 343 (U. S.), 15 L. Ed. 934. 1857.

One Sigerson transferred a bill of exchange to plaintiff, Goodman. This action was brought against Simonds, the acceptor. Upon the trial the court instructed the jury that "if such facts and circumstances were known to the plaintiff as caused him to suspect, or that would have caused one of ordinary prudence to suspect, that Wallace Sigerson had no interest in the bill, and no authority to use the same for his own benefit, and by ordinary diligence he could have ascertained these facts, then the jury will find for the defendant."

The plaintiff excepted and, the jury finding for the defendant, brings error.

CLIFFORD, J. The more important question, whether the instruction was correct, remains to be considered. * * * It was to the effect that, if the plaintiff had acquired the bill under the circumstances described in either branch of the instruction, then he had acted without due caution, and was not entitled to recover. All the other grounds of defense had been provided for in other prayers for instruction. This one was obviously prepared to raise the single question, whether the plaintiff had acted with due caution in acquiring the bill, and consequently assumed all the other requisites of a good title in favor of the plaintiff. The only question, therefore, arising under the instruction, is whether the rule of commercial law applied to the case was correct. Bills of exchange are commercial paper in the strictest sense, and must ever be regarded as favored instruments, as well on account of their negotiable quality as their universal convenience in mercantile affairs. They may be transferred by indorsement; or when indorsed in blank, or made payable to bearer, they are transferable by mere delivery. The law encourages their use as a safe and convenient medium for the settlement of balances among mercantile men; and any course of judicial decision calculated to restrain or impede their free and unembarrassed circulation would be contrary to the soundest principles of public policy.

Mercantile law is a system of jurisprudence acknowledged by all commercial nations; and upon no subject is it of more importance than there should be, as far as practicable, uniformity of decision throughout the world. A well-defined and correct exposition of the rights of a bona fide holder of a negotiable instrument was given by this court in Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865, as long ago as 1842; and we adopt that exposition relative to the point under consideration on the present occasion, as one accurately defining the nature and character of the title to those instruments which such holder acquires when they are transferred to him for a valuable consideration. This court then said, and we now repeat, that a bona fide holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. That question was not one of new impression at the date of that decision, nor was it so regarded either by the court or the learned judge who gave the opinion; on the contrary, it was declared to be a doctrine so long and so well established, and so essential to the security of negotiable paper, that it was laid up among the fundamentals of the law, and required no authority or reasoning to be brought out in its support; and the opinion on that point was fully approved by every member of the court, and we see no reason to qualify or change it in any respect.

Such being the settled law in this court, it would seem to follow as a necessary consequence, from the proposition as stated, that if a bill of exchange indorsed in blank, so as to be transferable by delivery, be misappropriated by one to whom it was intrusted, or even if it be lost or stolen, and afterwards negotiated to one having no knowledge of these facts, for a valuable consideration, and in the usual course of business, his title would be good, and that he would be entitled to recover the amount. The law was thus framed, and has been so administered, in order to encourage the free circulation of negotiable paper by giving confidence and security to those who receive it for value; and this principle is so comprehensive in respect to bills of exchange and promissory notes, which pass by delivery, that the title and

possession are considered as one and inseparable, and in the absence of any explanation the law presumes that a party in possession holds the instrument for value until the contrary is made to appear, and the burden of proof is on the party attempting to impeach the title. These principles are certainly in accordance with the general current of authorities, and are believed to correspond with the general understanding of those engaged in mercantile pursuits.

The word "notice," as used by this court on the occasion referred to, we think must be understood in the same sense as knowledge, and indeed that is one of its usual and appropriate significations. Where the supposed defect or infirmity in the title of the instrument appears on its face at the time of the transfer, the question whether a party who took it had notice or not is in general a question of construction, and must be determined by the court as matter of law; and so it was understood by this court in Andrews v. Pond et al., 13 Pet. 65, 10 L. Ed. 61, where it is said that "a person who takes a bill which upon the face of it was dishonored cannot be allowed to claim the privileges which belong to a bona fide holder. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it." And the same doctrine was adopted and enforced in Fowler v. Brantley, 14 Pet. 318, 10 L. Ed. 473, where, in speaking of a promissory note, so marked as to show for whose benefit it was to be discounted, this court held that all those dealing in paper "with such marks on its face must be presumed to have knowledge of what it imported." See Brown v. Davis, 3 Term, 80.

Other cases of like character, where the defect appears on the face of the instrument, are referred to in the printed argument for the defendant as affording a support to the instruction under consideration; but it is so obvious that they can have no such tendency that we forbear to pursue the subject. Ayer v. Hutchins, 4 Mass. 370, 3 Am. Dec. 232; Wiggin v. Bush, 12 Johns. (N. Y.) 306, 7 Am. Dec. 324; Cone v. Baldwin, 12 Pick. (Mass.) 545; Brown v. Tabor, 5 Wend. (N. Y.) 566.

But it is a very different matter when it is proposed to impeach the title of a holder for value by proof of any facts and circumstances outside of the instrument itself. He is then

to be affected, if at all, by what has occurred between other parties, and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had knowledge of such facts and circumstances at the time the transfer was made. Nothing less than proof of knowledge of such facts and circumstances can meet the exigencies of such a defense; else the proposition as stated is not true, that a party who acquires commercial paper in the usual course of business, for value and without notice of any defect in the title, may hold it free of all equities between the antecedent parties to the instrument. Admit the proposition, and the conclusion follows. And the question whether the party had such knowledge or not is a question of fact for the jury, and, like other disputed questions of scienter, must be submitted to their determination, under the instructions of the court; and the proper inquiry is: Did the party, seeking to enforce the payment, have knowledge, at the time of the transfer, of the facts and circumstances which impeach the title, as between the antecedent parties to the instrument? And if the jury find that he did not, then he is entitled to recover, unless the transaction was attended by bad faith, even though the instrument had been lost or stolen.

Every one must conduct himself honestly in respect to the antecedent parties, when he takes negotiable paper, in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not willfully shut his eyes to the means of knowledge which he knows are at hand, as was plainly intimated by Baron Parke, in May v. Chapman, 16 Mees. & W. 355, for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith. Mere want of care and caution, which was the criterion assumed in the instruction, falls so far below the true standard required by law, which is knowledge of the circumstances that impeach the title, that we feel indisposed to pursue the general discussion, and proceed to confirm the views we have advanced as to what the law is by referring to some of the decisions in the English courts, from which, as an important source of commercial law, most of our own rules upon the subject have been derived.

The leading case, among the more modern decisions in that country, is that of Goodman v. Harvey, 4 Ad. & El. 870. That

was a case in bank, on a rule nisi, which was made absolute. Lord Denman, in delivering judgment, said: "We are all of opinion that gross negligence may be evidence of mala fides, but it is not the same thing. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title." That case was followed by Luther v. Rich. 10 Ad. & El. 784, which was also argued before a full court, and the same learned judge held that the only proper mode of implicating the plaintiff in the alleged fraud by pleading was to aver that he had notice of it, leaving the circumstances by which that notice was to be proved directly or indirectly to be established in evidence; and he further held that an averment that the plaintiff was not a bona fide holder was not equivalent. According to the rule laid down in Goodman v. Harvey, which indubitably is the settled law in all the English courts, proof that the plaintiff had been guilty of gross negligence in acquiring the bill ought not to defeat his right to recover; and, if not, it serves to exemplify the magnitude of the error assumed in the instruction, that any facts and circumstances which would excite the suspicion of a careful and prudent man were sufficient to destroy the title. It is clear that one or the other of these rules must be incorrect; both cannot be upheld.

Gross negligence is defined to consist of the omission of that care which even inattentive and thoughtless men never fail to take of their own property; and if such neglect would not defeat the right to recover—and clearly it would not, unless attended by bad faith—it cannot require any further reasoning to demonstrate that the instruction was erroneous. Several cases have been decided in England upon the same subject, and to the same effect, and the rule laid down in Goodman v. Harvey is now adopted and sanctioned by the most approved elementary treatises upon commercial law. Raphael v. Bank of England, 33 Eng. L. & Eq. 276; Stephens v. Foster, 1 Cromp., M. & W. 849; Palmer v. Richards, 1 Eng. L. & Eq. 529; Arbouin v. Anderson, 1 Ad. & El. (N. S.) 498; May v. Chapman, 16 Mees. & W. 355; Chitty on Bills (12th Ed.) 257; Story on Bills (3d Ed.) sec. 416; Byles on Bills (4th Am. Ed.) 121 to 126; Smith's Mer. Law (Ed. 1857) 255; Edwards on Bills, 309; 1 Saund. Plea. & Ev. 591; Wheeler v. Guild, 20 Pick. (Mass.) 545, 32

Am. Dec. 231; Brush v. Scribner, 11 Conn. 388, 29 Am. Dec. 303; Backhouse v. Harrison, 5 Barn. & Ad. 1098; Gwynn v. Lee, 9 Gill (Md.) 138.

Judgment reversed.

Defenses—Fraud in the Execution.

CHAPMAN v. ROSE.

56 N. Y. 137. 1874.

This action was upon a promissory note of $270, signed by defendant, payable to E. A. Miller or bearer.

Defendant entered into a contract with Miller to act as agent for the sale of a patent hay fork and pulley. A contract was filled out by Miller and signed by both; also an order, which was signed by defendant, for one of the hay forks and two pulleys, for which, by the order, defendant agreed to pay nine dollars. These were delivered to defendant. Another paper was then presented to defendant for his signature, which Miller represented to be but a duplicate of the order. Defendant without reading or examining it, signed it and delivered it to Miller; the paper so signed was the note in suit. Plaintiff purchased in good faith before maturity, paying therefor $245.

The court charged the jury: "If you find that this paper was never delivered as a note, plaintiff fails in his action; if you find it was delivered but that this plaintiff failed or neglected to make the proper inquiry, then he is not entitled to recover, for he fails as a bona fide holder."

Plaintiff excepted generally to the whole of the charge.

Plaintiff requested the court to charge:—

First. That if the signature upon the note is the genuine handwriting of defendant, circumstances of fraud in its inception constitute no defense to the note in the hands of an innocent purchaser.

The court refused to so charge.

Second. That if the plaintiff purchased said note in good faith and for a valuable consideration, the plaintiff is entitled to judgment for the full amount thereof.

Third. That if defendant negligently and without sufficient

care and precaution put his name to the paper and delivered it to Miller, he is liable for its amount as a promissory note.

Fourth. That there are no circumstances in this case indicating a fraud in the inception, and which were calculated to put the plaintiff on his guard, and therefor he is a purchaser in good faith.

The court declined to charge either of these propositions.

Verdict and judgment for plaintiff (defendant?)

JOHNSON, J.—The judge charged the jury that if the paper sued upon was never delivered as a note, the plaintiff must fail in the action; and that even if it was delivered, and the plaintiff neglected to make proper inquiry as to its origin, he was not a bona fide holder and could not recover. The exception to the charge was general, but if both propositions were erroneous the error can be reached and corrected; especially as the attention of the judge appears to have been called, by requests to charge, to the precise grounds on which the charge is now claimed to be erroneous.

The latter branch of the charge presents the question of notice to put a party on inquiry, as affecting his right to be regarded as a bona fide holder. It is now, however, the settled law that mere negligence, however gross, is not sufficient to deprive a party of the character of a bona fide holder. There must be proof of bad faith. That alone will deprive him of that character. Welch v. Sage, 47 N. Y. 143; Seybel v. National Currency Bank, Commission of Appeals, 54 N. Y. 288; Murray v. Lardner, 2 Wall. 110; Goodman v. Simonds, 20 How. 452. This part of the charge, therefore, cannot be sustained. If, then, the appellant can maintain the position that the other branch of the charge is also erroneous, he will be entitled to the reversal of the judgment, notwithstanding the generality of the exception.

The evidence tended very strongly to show that the signature of the defendant to the note sued upon, was obtained from him by a very gross and fraudulent representation perpetrated upon him by one Miller. That when he signed it, he supposed he was signing a paper of a very different character, and not an engagement to pay money absolutely. He had, just before, signed an order for the delivery to himself of a hay fork and two grappling

pulleys, amounting together in price to nine dollars, for which he engaged to pay; and this paper now in suit was presented to him as a duplicate of that order, and was signed as such without examination or reading it, upon the statement of Miller, with whom he was dealing, that such was its character. There does not appear to have been any physical obstacle to the defendant's reading the paper before he signed it. He understood that he was signing a paper by which he was about to incur an obligation of some sort, and he abstained from reading it. He had the power to know with certainty the exact obligation he was assuming, and chose to trust the integrity of the person with whom he was dealing, instead of exercising his own power to protect himself. It turns out that he signed a promissory note, and that it is now in the hands of a holder in good faith, for value. The question which arises on the branch of the charge now under consideration is, whether it is enough, as against a bona fide holder, to show that he did not know or suppose that he was signing a note, unless it also appears that he was guilty of no laches or negligence in signing the instrument. To that inquiry the attention of the judge, at the trial, was distinctly called; and the instruction which he gave and which was excepted to, did not submit, but excluded the consideration of it from the jury. It is quite plain that if the law is that no such inquiry is admissible, a serious blow will have fallen upon the negotiability of paper. It will be a premium offered to negligence. To insure irresponsibility only the utmost carelessness, coupled with a little friendly fraud, will be essential. Paper in abundance will be found afloat, the makers of which will have had no idea they were signing notes, and will have trusted readily to the assurance of whoever procured it that it created no obligation. To avoid such evils it is necessary, at least, to hold firmly to the doctrine that he who, by his carelessness or undue confidence, has enabled another to obtain the money of an innocent person, shall answer the loss. If it be objected that there must be a duty of care, in order to found an allegation of negligence upon the neglect of it, it must be answered that every man is bound to know that he may be deceived in respect to the contents of a paper which he signs without reading. When he signs an obligation without ascertaining its character and extent, which he has the means to

do, upon the representation of another, he puts confidence in that person; and if injury ensues to an innocent third person by reason of that confidence, his act is the means of the injury, and he ought to answer to it. * * *

In Douglas v. Matting, 29 Iowa, 498, the judge says: "It is better that the defendants and others who so carelessly affix their names to papers, the contents of which are unknown to them, should suffer from the fraud their recklessness invites, than that the character of commercial paper should be impaired and the business of the country thus interfered with and unsettled."

In all these cases, the real ground of decision is not that the party meant to make a promissory note, but that meaning to make an obligation in writing, and which was put in writing that it might of itself import both the fact and the form and the measure of the obligation, he trusted another to fix that form and measure, without exercising that supervision which was in his power and by which perfect protection was possible. In such cases, the rule is, that he is bound by the act of him who has been trusted in favor of a holder in good faith.

The judgment must be reversed and a new trial granted, costs to abide the event.

All concur. Judgment reversed.

CHAPTER VII.

LIABILITIES OF PARTIES.

Admissions by Acceptor.

PRICE v. NEAL.

3 Burrow 1354 (Eng.). 1762.

This was an action upon the case brought by Price against Neal; wherein Price declares that the defendant Edward Neal was indebted to him in 80*l.* for money had and received to his the plaintiff's use; and damages were laid to 100*l.* The general issue was pleaded; and issue joined thereon.

It was proved at the trial, that a bill was drawn as follows: "Leicester, 22 November, 1760. Six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor; as advised by, Sir, your humble servant Benjamin Sutton. To Mr. John Price in Bush-lane, Cannon-street, London; indorsed 'R. Ruding, Antony Topham, Hammond and Laroche. Received the contents, James Watson and Son: witness Edward Neal.'"

That this bill was indorsed to the defendant for a valuable consideration; and notice of the bill left at the plaintiff's house, on the day it became due. Whereupon the plaintiff sent his servant to call on the defendant, to pay him the said sum of 40*l.* and take up the said bill: which was done accordingly.

That another bill was drawn as follows: "Leicester, 1st February, 1761. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor; as advised by, Sir, your humble servant Benjamin Sutton. To Mr. John Price in Bush-lane, Cannon-street, London." That this bill was indorsed, "R. Ruding, Thomas Watson and Son. Witness for Smith, Right & Co." That the plaintiff accepted this bill, by writing on it, "accepted John Price"; and that the plaintiff wrote on the back of it, "Messieurs Freame & Barclay, pray pay forty pounds for John Price."

That this bill so accepted was indorsed to the defendant for

a valuable consideration, and left at his bankers for payment; and was paid by order of the plaintiff, and taken up.

Both these bills were forged by one Lee, who has been since hanged for forgery.

The defendant Neal acted innocently and bona fide, without the least privity or suspicion of the said forgeries or of either of them; and paid the whole value of those bills.

The jury found a verdict for the plaintiff, and assessed damages 80*l.* and costs 40*s.* subject to the opinion of the court upon this question:—

"Whether the plaintiff, under the circumstances of this case, can recover back, from the defendant, the money he paid on the said bills, or either of them." * * *

LORD MANSFIELD: It is an action upon the case, for money had and received to the plaintiff's use. In which action, the plaintiff can not recover the money, unless it be against conscience in the defendant, to retain it; and great liberality is always allowed, in this sort of action.

But it can never be thought unconscientious in the defendant, to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he has bona fide paid, without the least privy or suspicion of any forgery.

Here was no fraud; no wrong. It was incumbent upon the plaintiff, to be satisfied, "That the bill drawn upon him was the drawer's hand," before he accepted or paid it; but it was not incumbent upon the defendant, to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him; and he sends his servant to pay it and take it up. The other bill, he actually accepts: after which acceptance, the defendant innocently and bona fide discounts it. The plaintiff lies by, for a considerable time after he has paid these bills; and then found out "That they were forged"; and the forger comes to be hanged. He made no objection to them, at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself, for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first: and he paid the whole value, bona fide. It is a misfortune

which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man: but, in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant.

RULE.—That the postea be delivered to the defendant.

Liability of the Indorser.

MT. MANSFIELD HOTEL COMPANY v. BAILEY.

64 Vt. 151, 24 Atl. Rep. 136. 1892.

Special assumpsit for the annual interest due on five promissory notes indorsed by the defendant. Plea, the general issue. Judgment for the defendant. The plaintiff excepts.

TYLER, J.—It appears by the statement of facts that Geo. Doolittle and Mrs. E. J. Doolittle promised to pay the defendant, William P. Bailey, or order, five thousand dollars, as their five promissory notes should respectively become due and the interest thereon annually. The notes are dated April 1, 1886, are for $1,000 each and payable 16, 17, 18, 19 and 20 years from their date.

The plaintiff, as the indorsee of the notes, seeks to recover of the defendant, as indorser, the first three years' interest upon them without demand of the makers and notice to the defendant of the makers' default of payment.

The defendant's counsel contended,—1st, that the indorser cannot in any event be compelled to pay the interest as it annually falls due, that his conditional liability does not become absolute until the notes respectively mature and then only after demand and notice.

2d. That if the interest is collectable of the indorser as it annually accrues it is after the usual measures have been taken to make him chargeable.

The general rule of law relative to the respective liabilities of the maker and indorser of a promissory note is well defined. The promise of the maker is absolute to pay the note upon presentment at its maturity. The promise of the indorser is

conditional that if, when duly presented, it is not paid by the maker, he, the indorser, will, upon due notice given him of the dishonor, pay the same to the indorsee or other holder.

It seems clear that the indorser is not liable for the annual payment of the interest without performance of these conditions by the holder. If he were thus liable his relation to the note would be like that of a surety or a joint maker and his promise, instead of being conditional, would be absolute as to the payment of the interest. This is contrary to the general statement of the law that his liability is conditional. The relation of principal does not exist between him and the maker. They are not co-principals. Their contracts are separate and they must be sued separately, at common law. Randolph Com. Paper, s. 739.

The maker has received the money of the payee and in consideration thereof promises (absolutely) to repay it according to the terms of the note, and if he fails to pay, his contract is broken and he is liable for the breach. The contract of the indorser is a new one, made upon a new consideration moving from the indorsee to himself. His undertaking is in the nature of a guaranty that the maker will pay the principal and interest according to the terms of the note. His liability is fixed upon the maker's default upon demand, and notice to him of such default. This new contract cannot be construed as an absolute one to pay the interest without default of or demand upon the maker. The promise cannot be absolute as to the payment of interest when it is clearly conditional as to the payment of the principal.

It is held that though the annual interest (interest payable annually) upon a promissory note may be collected of the maker as it falls due, it is not separated from the principal so that the recovery of it is barred by the statute of limitations until the recovery of the principal is thus barred. Grafton Bank v. Doe et al., 19 Vt. 463. The holder of a note with interest payable annually loses no rights against the parties to it, whether makers or indorsers, by neglecting to demand interest, and he has the election to do so, or wait and collect it with the principal, for it is regarded as an incident of the principal. National Bank of North America v. Kirby, 108 Mass., 497. But it is so far an independent debt that he may maintain an action

against the makers for it as it annually accrues, or allow it to accumulate and remain as a part of the debt until the note matures. Catlin v. Lyman, 16 Vt., 44. In the latter course the makers would be chargeable with interest upon each year's interest from the time it was due until final payment. 1 Aik., 410; Austin v. Imus, 23 Vt., 286. It was said, by the court in Talliaferro's Ex'rs. v. King's Admr., 9 Dana, 331, 35 Am. Dec., 140: "The interest, by the terms of the covenant, is made payable at the end of each year, and is as much then demandable as if a specific sum equal to the amount of interest had been promised; and, in default of payment, as much entitles the plaintiff to demand interest upon the amount so due and unpaid. The fact that the amount so promised to be paid is described as interest accruing upon a larger sum, which is made payable at a future day, cannot the less entitle the plaintiff to demand interest upon the amount, in default of payment, as a just remuneration in damages for the detention or non-payment."

It is true that at the maturity of the notes the defendant would be liable, as indorser, for both principal and interest, upon due demand and notice, although these measures had not been taken to make him chargeable as the interest fell due each year. Notice of the maker's default of payment of interest need not be given annually to the indorser in order to charge him with liability for interest when the note matures. This is so stated by the court in National Bank of North America v. Kirby, supra. In Howe v. Bradley, 19 Me. 31, it is held that when a note is made payable at some future period, with interest annually till its maturity and no demand is made for the annual interest as it becomes due, or if made, no notice thereof is given, the indorser, if duly notified of the demand and non-payment when the note falls due, is liable for the whole amount due, both principal and interest; that the obligation imposed by the law upon the holder is only to demand payment and give the required notice when the bill or note becomes payable. It is not held in this country that interest is subject to protest and notice, according to the law merchant, in order to charge indorsers with it when the note matures. The usual consequence of omission to notify the indorser of the maker's default, namely, the release of the indorser, would

not follow the omission to give him annual notice of such default. A note is not dishonored by a failure of the maker to pay interest. First National Bank v. County Commissioners, 14 Minn., 77, 100 Am. Dec., 196, Note.

The defendant's counsel argues that it would be inconsistent to hold the indorser liable for interest which is a mere increment of the principal, until his liability is established to pay the sum out of which the interest springs; that there may be defences to the note at its maturity which will release the maker and consequently the indorser, or that the indorser may then be released by neglect of demand and notice. On first impression it might seem inconsistent that the maker should be compelled to pay interest before his liability has been fixed to pay the principal, but that is his contract. It is also argued that the fact that the interest, when uncollected, is an incident of the debt so that as it annually falls due, demand and notice are not necessary in order to charge either the maker or the indorser with liability to pay it when the note matures, is ground for holding that the indorser is not liable for interest until he is made liable for the principal.

The question is whether the indorser, by the act of indorsement, promises to pay anything on the note till its maturity, at which time he clearly may be made liable for both principal and interest. The note bears upon its face an absolute promise by the maker to pay the principal when it becomes due and the interest thereon annually. His promise is two-fold. It is as absolute to pay the interest at the end of each year as to pay the principal at the end of the time specified. Now what is the nature of the contract which the indorser makes with the indorsee? His contract is not in writing, like that of the maker, but his name upon the note is evidence that he has received value for it, and also of an undertaking on his part that it shall be paid according to its tenor. When he indorses it and delivers it to the indorsee he directs the payment to be made to the latter, and in effect represents that the maker has promised to pay certain sums of money according to the terms of the note, that is, the principal at maturity and the interest annually; that if the maker fails to pay on demand, he, the indorser, will pay on due notice. His conditional promise is concurrent with the absolute promise of the maker. His liability

to pay interest and principal, as each respectively falls due, arises from his contract. It is his contract that he will make payment whenever the maker is in default and he, the indorser, is duly notified thereof.

It is true that interest is an incident, an increment of the principal, and that the holder may wait for it until his note matures and then collect it with the principal. He may, however, by the contract, collect it as it falls due, of the maker, and upon the latter's default, of the indorser.

The courts of England have never recognized the American doctrine that interest is a mere incident, an outgrowth of the principal, and in many cases follows and is recoverable as such without an express contract. Until 37 Hen., 8, c. 9, it was unlawful to demand interest even upon a contract to pay it. Since the case of DeHavilland v. Bowerbank, 1 Camp., 50, interest has been allowed in England upon express contracts therefor, and not otherwise. Where there is such a contract interest stands like the principal in respect to the rights and liabilities of an indorser. Sedg. on Dam., 383; Selleck v. French, 1 Conn., 32, 6 Am. Dec., 189, Note. In Jennings v. Napanee Brush Co., Reported in Canada Law Jour., Vol. 20, No. 19, in a learned opinion by McDougall, J., it was held that where there was an express contract to pay interest annually or semi-annually, it was not different from a contract to pay an installment of the principal itself, and that notice to the indorser of the maker's default was necessary to charge the indorser with it. In that case the indorser was released from payment of the first two half-yearly installments of interest for want of demand and notice.

While we adhere to the doctrine laid down in Grafton Bank v. Doe, et al., supra, that interest is in general an incident of the debt, it is consistent to hold that where the indorser is himself a party to the original contract to pay interest annually, as in the case at bar, by his indorsement he guarantees the performance of that contract. Any other holding would make the indorser liable for only a part of the maker's contract.

The case of Codman v. The Vt. and Can. Railroad Co., 16 Blatch. 165, has been brought to our attention. The trustees and managers of the Vermont Central Railroad Co., and the Vt. and Can. Railroad Co., issued notes to the amount of $1,000,000,

in sums of $1,000 each, payable to the defendant company, in twenty years from their date, with interest semi-annually on presentation of the interest coupons made payable to bearer and attached to the notes. On each note was this indorsement, signed by the treasurer of the defendant, under its seal: "For value received, the Vermont and Canada Railroad Company hereby guarantee the payment of the within note, principal and interest, according to its tenor, and order the contents thereof to be paid to the bearer." The coupons were not indorsed. The notes were put on the market and the plaintiff purchased fifty of them, and subsequently, after due demand, notice and protest, brought this suit to recover the amount of two coupons on each of his notes, the notes themselves not having matured. Without passing upon the question whether the guaranty was negotiable and available to the plaintiff, as a remote holder, WHEELER, J., among other questions that arose in the case, decided that the indorsement was a contract of indorsement running to the bearer, and that demand, notice and protest fixed the liability of the indorser to pay the coupons, and gave judgment for plaintiff for the amount of the coupons.

The Supreme Court of the United States has repeatedly held that the statute of limitations begins to run upon interest coupons payable annually or semi-annually, from the time they respectively mature, although they remain attached to the bonds which represent the principal debt. Amy v. Dubuque, 98 U. S., 470. Where the indorser is the payee of the note there would seem to be no difference in his liability in respect to interest whether the maker's promise to pay it is contained in the body of the note or in interest coupons not indorsed, the notes to which they are attached being indorsed, and the coupons being mentioned in the notes; but it is unnecessary to decide that question here.

Upon the facts found by the county court this action cannot be maintained for the reason that the plaintiff never fixed the defendant's liability to pay the three years' accrued interest. It does not even appear that the makers refused payment of it or that they were requested to pay it before this suit was brought; therefore nothing is due from the defendant to the plaintiff.

Judgment affirmed.

Warranty of Title by Seller.

DUMONT v. WILLIAMSON.

18 Ohio St. 515. 1869.

SCOTT, J. The original action in this case was brought by the plaintiff in error, who states in his petition "that Henry Essman, on the 12th of May, 1860, at Cincinnati, made his promissory note in writing of that date, and thereby promised to pay to the order of William Wolff five hundred dollars, for value received, in four months after the date thereof, and which said promissory note purports to be indorsed on the back thereof by Wm. Wolff, which said note afterward came to the hands of the defendant, who afterward then and there indorsed and delivered the same to the plaintiff, but without recourse on him. The plaintiff avers that the defendant did thereby warrant that the indorsement on the back thereof was the signature of William Wolff, and was made by him, whereas in truth and in fact said signature on the back of said note was not made by said William Wolff, but was and is a forgery, and by reason thereof said note was wholly worthless, and of no value, the said Henry Essman, the maker thereof, being wholly insolvent."

The petition proceeds to allege due demand and notice of non-payment at maturity, and asks judgment for the amount of the note, with interest.

A copy of the note is attached to the petition, which, with the indorsement thereon, corresponds with the statements of the petition.

To this petition the defendant demurred, and the case was thereupon reserved from special term for the opinion of the judges in general term upon the questions of law arising on the demurrer. By the judgment of the court in general term the demurrer was sustained, and the plaintiff not desiring to amend his petition, it was thereupon dismissed, and judgment rendered against plaintiff for costs.

The plaintiff here asks a reversal of this judgment on the ground of error in the Superior Court in sustaining the demurrer to his petition.

There is no statement in the petition of the circumstances under which the note in this case was transferred to the plaintiff, or the consideration paid therefor, but it is to be presumed that it was so transferred for a valuable consideration. If the fact be otherwise, this is a matter of defense, to be set up by answer.

There is no averment of fraud, or that the defendant had knowledge at the time of the transfer, of any defect in the note, which he concealed. The question therefore arises, whether upon the sale and transfer of a promissory note by indorsement, "without recourse," the vendor impliedly warrants that the signature of the prior parties whose names appear thereon are genuine.

Whilst the words "without recourse," accompanying an indorsement, clearly indicate that the party making the transfer does not intend to assume the position of an unconditional indorser, or to incur any liability if the note is not paid at maturity, upon due demand, or even if all the parties to the paper should prove to be wholly insolvent, we think they can not be construed as importing more than this. At least they do not divest such indorser of his character as a vendor of the note, nor exempt him from the liabilities arising from a sale and transfer by delivery, where the note is capable of being thus transferred. In such case, then, is there no implied warranty on the part of the vendor that the note is not forged? That it is in fact what it purports on its face to be?

On this question the language of the text-books, in this country at least, is nearly, if not quite, uniform.

Justice Story, in his Commentary on Promissory Notes, § 118, speaking of the liabilities of a party who transfers a note by delivery only, says: "In the first place he warrants by implication, unless otherwise agreed, that he is a lawful holder, and has a just and valid title to the instrument, and a right to transfer it by delivery; for this is implied as an obligation of good faith. In the next place, he warrants, in like manner, that the instrument is genuine, and not forged or fictitious." To this the editor of the fourth edition of the work, published in 1856, adds in brackets: ["that it is of the kind and description it purports on its face to be; unless where the note is sold, as other goods and effects, by delivery merely, without indorse-

ment, in which case it has been decided that the law respecting the sale of goods is applicable, and that there is no implied warranty";] referring in the notes to the cases of Baxter v. Duren, 29 Maine R., 434; Ellis v. Wild, 6 Mass. R., 321, and other authorities, also to conflicting decisions. This new matter was added to the text after Justice Story's death, as is shown by the brackets, and was evidently intended only as a statement of the authorities bearing on the question. The exception stated to the general rule as laid down by Judge Story can not, therefore, claim the sanction of his name.

The law is similarly stated in Parson on Notes and Bills, Vol. 2, pages 37, 39, where it is said to be "well settled that the vendor without indorsement [the transferrer] warrants that the paper is of the kind and description that it purports to be." In a note on page 38, the case of Baxter v. Duren, supra, is referred to, where it was held that one who sells and transfers a promissory note by delivery is not liable on an implied warranty of its genuineness, if he sold the same as property, and not in payment of a debt previously existing or then created, and if he did not know of the forgery. But it was said in that case that if the note was transferred by delivery merely, in payment of a debt due, or for goods then purchased, or by way of discount for money then loaned, there would in such case be an implied warranty of the genuineness of the paper. "But," adds the learned author, "this distinction does not seem to be well founded." And again, at page 589 of the same volume, the principle is broadly stated "that any transferrer of a note or bill transferable by delivery, warrants that it is no forgery. If it turns out that the name of one of the parties is forged, and the bill becomes valueless, the vendor, though no party to the bill, becomes liable to the vendee as upon a failure of consideration." He then proceeds to state, without further comment, the distinction which was taken in the case of Baxter v. Duren, supra, and of which he had previously disapproved.

So, in Edwards on Bills and Promissory Notes, page 291, it is said: "The party assuming to transfer a negotiable instrument thereby asserts it to be genuine, and is bound to make his assertion good." And on page 289: "Though the indorser transfers the note upon condition that it is to be collected at the risk of the indorsee, he is nevertheless responsible if the note

proves to be a forgery. Shaver v. Ehle, 16 Johns. R., 201, and 20 N. Y. R., 226.

In England, it seems to be well settled, by the latest decisions on the subject, that the vendor of a bill of exchange is responsible for its genuineness. Thus, in Gompertz v. Bartlett, decided in 1853, it was held by the Court of Queen's Bench that the vendor of a bill of exchange impliedly warrants that it is of the kind and description that it purports on the face of it to be. 24 Eng. L. and E. Rep., 156; 23 L. J. Ex., 65; see also Challis v. McCrum, 22 Kan. 157; Bell v. Dagg, 60 N. Y., 528; Bell v. Cafferty, 21 Ind., 411. And in Gurney and others v. Womersley, 24 L. J., Q. B., 46, decided in 1854 by the same court, it was held that the vendor of a bill of exchange, though no party to the bill, is responsible for its genuineness; and if it turns out that the name of one of the parties is forged, and the bill becomes valueless, he is liable to the vendee, as upon a failure of consideration. Both these cases were decided on the same principle which is applied in sales of personal property generally, that the vendor impliedly warrants that the article sold is of the kind and description which it imports and is understood by the parties to be.

In the case of Baxter v. Duren, 29 Me., 434, supra, it was held that one who sells a promissory note, by delivery, upon which the names of indorsers have been forged, is not liable upon an implied promise to refund the money received therefor, if he sold the same as property, and not in payment of a precedent debt, and did not know of the forgery.

The same doctrine was held in the case of Ellis v. Wild, 6 Mass., 321, where the same distinction was made between the sale of the note and its transfer in payment of a debt. But the doctrine is no longer maintained in that commonwealth. Cabot Bank v. Morton, 4 Gray, 156; Lobdell v. Baker, 1 Met., 193; Merriam v. Wolcott, 3 Allen, 258. In the last of these cases, Ellis v. Wild and Baxter v. Duren are both considered, and, for what seems to us good reasons, disapproved; and it is held that there is no valid reason for the distinction taken in those cases.

In Aldrich v. Jackson, 5 R. I., 218, the doctrine is expressly stated that "the vendor of a bill or note, by the very act of

sale, impliedly warrants the genuineness of the signatures of the previous parties to it."

The same doctrine is held in Terry v. Bissel, 26 Conn., 23, and in Thrall v. Newell, 19 Vt., 202.

And the principle upon which these decisions rest has its foundation, as we think, in reason and justice.

In the sale of what purports to be a promissory note, it is not the material substance of the paper and ink for which the consideration is understood by the parties to be paid, but it is the chose in action of which the note purports to be the evidence, that is the real subject of negotiation and transfer. But if the note is forged, if no such chose in action exists, if the vendor neither owns nor parts with anything of the kind, it is difficult to see any just ground upon which he can be allowed to retain the purchase money. He has undertaken to sell what he did not own, and that which in fact has no existence. The maxim of caveat emptor is inapplicable to such a case.

The present case, however, is much stronger. It is not a case of sale by delivery merely, but by indorsement, qualified, it is true, so as to exclude the liabilities consequent thereon under the commercial law. Still, the defendant is a party to the note, he has sold and transferred it as such, and he is bound to make his representation good. On this question we know of no conflict in the authorities.

The judgment of the court below must then be reversed, the demurrer to the plaintiffs petition overruled, and a procedendo awarded.

Warranty of Capacity of Prior Parties by Seller.

ERWIN v. DOWNS.

15 N. Y. 575. 1857.

[Action against defendant as indorser of two promissory notes, signed in the firm name by two married women doing business as a mercantile firm under the name of Waller & Burr. Before the notes matured defendant indorsed them to plaintiff, who paid full consideration, but had notice of the fact that the makers were under legal disability to contract. The notes were duly presented for payment, which was refused, and de-

fendant was duly notified. There was judgment for plaintiff and defendant appealed.]

SHANKLAND, J. The note was void, as against the makers, because they were married women, and incapable of contracting obligations in that form. But when the defendant indorsed the note, he impliedly contracted that the makers were competent to contract, and had legally contracted, the obligation of joint makers of the note. He also assumed the legal obligation, in most respects, of the drawers of the bill. The fact, known to the plaintiff at the time he took the note, that the makers were married women did not deprive him of the character of a bona fide purchaser. Nor does the payee's knowledge that the drawee is a married woman discharge the drawer in case of non-payment of the bill by the drawee. Nor is the indorser discharged, though the name of the maker is forged: I Comst. 113. The fact is not found that the plaintiff was aware the note was accommodation paper. The plaintiff was a bona fide purchaser within the law merchant. Neither the complaint nor the finding of the referee tell us who transferred the notes to the plaintiff. The legal presumption is that he received them from some legal holder in due course of business.

The judgment should be affirmed.

Judgment affirmed.

CHAPTER VIII.

PRESENTMENT, NOTICE OF DISHONOR, AND PROTEST.

Time for Presentment—Paper Payable on Demand.

MONTELIUS v. CHARLES.

76 Ill. 303. 1875.

SCOTT, J. This action was upon an inland bill of exchange, in the name of a remote assignee, against the drawers. One important question is whether the holders had been guilty of such laches before presenting it to the drawee for payment, as would bar a recovery against the drawers.

Defendants were engaged in the banking business at Piper City, in this State. On the 8th day of September, 1873, on the application of James McBride, they drew their draft on the Franklin Bank of Chicago, payable at sight, to the order of John Strank, who then resided at Canton in Dakota. It was on the same day deposited in the post-office, directed to the payee at Canton, who received it after some delay, attributable alone to the fault of the mails. Having passed through the hands of several holders, it was presented on the 13th day of October, 1873, to the bank for payment, which, being refused, it was protested and notice given through the post-office to the drawers and the several indorsers. In the meantime the Franklin Bank, on which the draft had been drawn, had failed and gone into bankruptcy.

The law is settled by an unbroken line of decisions that all drafts, whether foreign or inland bills, must be presented to the drawee within a reasonable time, and in case of non-payment notice must be given promptly to the drawer, to charge him. But what is a reasonable time under all the circumstances is sometimes a most difficult question. The general doctrine is each case must depend on its own peculiar facts, and be judged accordingly.

In Strong v. King, 35 Ill. 9, it was declared to be a general rule, the holder of a sight draft must put it in circulation or present it for payment, at farthest, on the next business day after its reception, if within the reach of the person on whom it is drawn. In the case at bar, the draft was put in circulation, and the point is made, the mere fact it was not presented for payment until after the lapse of thirty-five days, is per se such laches on the part of the holders as would discharge the drawers.

In Muilman v. D'Eguino, 2 H. Black. 565, EYRE, C. J., said: "Courts have been very cautious in fixing any time for an inland bill, payable at a certain period after sight, to be presented for acceptance, and it seems to me more necessary to be cautious with respect to foreign bills payable in that manner. If, instead of drawing their foreign bills payable at usances in the old way, merchants choose, for their own convenience, to draw them in this manner and make the time commence when the holder pleases, I do not see how the Courts can lay down any precise rule on the subject. I think, indeed, the holder is bound to present the bill in a reasonable time, in order that the period may commence from which the payment is to take place. The question what is a reasonable time, must depend on the peculiar circumstances of the case, and it must always be for the jury to determine whether laches is imputable to the plaintiff."

BULLER, J. "Due diligence is the only thing to be looked at, whether the bill be a foreign or an inland one, and whether it be payable at sight, at so many days after, or in any other manner. But here I must observe that I think a rule may thus far be laid down with regard to all bills payable at sight, or at a certain time after sight, namely, that they ought to be put in circulation. If they are circulated the parties are known to the world and their credit is looked to; and if a bill drawn at three days' sight were kept out in that way for a year, I cannot say there would be laches. But if, instead of putting it in circulation, the holder were to lock it up for any length of time, I should say he was guilty of laches."

Bills, both inland and foreign, having the quality of negotiability, are intended in some degree, to be used as a part of

the circulation of the country, and are indispensable in the conduct of extended commercial transactions. They afford a safe and convenient mode of making payments of indebtedness between distant points. Banking houses that for a consideration, issue such bills, must be understood to do so in accordance with the known custom of the country—that they will be put in circulation for a limited period. If this were not so their value would be greatly depreciated, and their utility in commercial transactions would be destroyed. Were it understood the purchaser of such a bill was bound to make all possible despatch to present it to the drawee or lose his recourse on the drawer, no prudent man would feel safe in taking one. He may know the drawer from whom he purchases the bill, and be willing to rely on his responsibility, but in many instances he has and can have no knowledge of the drawer's correspondent, the drawee. Commercial usage has, therefore, placed the responsibility upon the drawer, and he is presumed, in consideration of the premium paid, to assume all risks as to the solvency of the drawee for such reasonable time as the bill shall be kept in circulation. There can be no doubt, if the holder locks it up and keeps it out of circulation, he assumes all risks, and in case the bill is dishonored, his laches in that regard would bar a recovery against the drawer. Such bills are not issued with a view to be held as a permanent security, with a continuing liability on the drawer. Illustrative of the law of this branch of the case, is Shute v. Robbins, 3 C. & P. 80.

The difficulty is to determine for what length of time such a bill may be kept in circulation, consistently with a continuing liability on the drawer. The rule adopted, as we have seen, is, it must be presented in a reasonable time under all the circumstances. But Courts, not infrequently, experience great perplexity in making a distinction between a reasonable time for the presentation of such paper and laches on the part of the holder. Every case differs so essentially in its facts, it has given rise to many apparently contradictory decisions, but through all of them is noticeable the efforts of the Courts to ascertain whether the bill was kept in circulation for only a reasonable period in the regular course of business. When that fact is once established the liability of the drawer is regarded as continuing. It will be found the decisions differ only

in what the various Courts deemed reasonable in each particular case.

In Robinson v. Ames, 20 Johns. 147, the bill declared on was drawn on the 6th of March, but not presented for payment to the drawees until the 20th of May. In the meantime the drawees had failed, but in a well-reasoned opinion the Court came to the conclusion there was no such laches as would discharge the drawer.

In Jordon v. Wheeler, 20 Tex. 698, the bill in suit was put in circulation and indorsed by defendants without having been presented for acceptance before it came to the hands of the plaintiff; that a little more than a month elapsed before he presented it for payment, and that was declared to be according to usage.

In Nichols v. Blackmore, 27 Tex. 586, the Court was of opinion a delay of forty-seven or forty-eight days was not such laches as would forfeit the right of the holder to recourse against the drawer in default of payment by the drawees.

Many other cases of the same import might be cited, but these are sufficient for our present purpose. They establish, beyond doubt, the fact, there is no fixed period in which the bill must be presented for payment, but that each case must be decided on its own peculiar facts in the light of commercial usage.

In the case at bar the bill was immediately put in circulation. It was mailed to the payee on the day it bore date, to his proper address in Dakota. Some delay occurred, attributable to interruption in the transmission of the mails, but this fact could not be imputed to the payee as laches. On the receipt, the payee immediately undertook and availed of the first opportunity to negotiate the bill. It was kept in circulation, and no delay was suffered other than that incident to the transaction of business in a sparsely populated territory like Dakota. The facts and circumstances proven show no laches on the part of any holder that would operate to discharge the drawers.

Aside from the presumption that will be indulged, the drawers must have known the bill was liable to be put in circulation for a limited period. The evidence, though conflicting, warranted the Court in finding the draft was sold with the knowledge that it was to be sent to the payee in Dakota. That being

so, on every principle of justice, waiving all consideration of commercial usage, defendants ought to be held to have taken upon themselves the risk of the failure of the drawee for such reasonable time as it would take the bill to go there and be returned in the usual course of business, all things considered, and to be presented to the drawee at Chicago. We entertain no doubt their obligation is to this extent. It would be absurd to suppose it was within the contemplation of the drawers the bill was to be sent directly to the drawee at Chicago for payment. The law imposed no such duty upon the party procuring it. He could rightfully send it to his creditor and be guilty of no laches.

No error appearing in the record, the judgment will be affirmed.

Judgment affirmed.

Time for Presentment When Instrument Payable at a Bank.

SALT SPRINGS NATIONAL BANK v. BURTON.

58 N. Y. 430. 1874.

Appeal from judgment of the general term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of plaintiff entered upon the decision of the Court upon trial at circuit without a jury.

This action was brought upon a promissory note made by defendant Phelan and indorsed by defendant Burton, who alone defended. The note was made payable at the First National Bank of Waterloo.

The Court found the following facts, among others: That it was the ordinary custom of said bank to commence its business at nine o'clock in the forenoon of the day and to close the same at four o'clock in the afternoon; that on the day said note fell due the defendant Burton was ready to pay the same, and sent Phelan, the maker of the note, to said bank several times during banking hours to see if said note was there and ascertain the amount of the same, but he was informed each time that the note was not in the bank; that on said day Thomas J. Leach, the cashier of the plaintiff, went to Waterloo, having said note in his possession, but did not arrive there till

about five o'clock in the afternoon. He went to the said bank and obtained entrance. He found therein Myndert D. Mercer, who was the cashier of said bank and also a notary public. He then and there presented to said Mercer said note and demanded payment thereof, and payment was refused for the reason that no funds had been left with the bank to pay the same; thereupon said Mercer protested said note. This was the first time that said note was presented to said bank for payment on that day.

As a conclusion of law, the Court held the defendant Burton liable and directed judgment for the amount of the note.

RAPALLO, J. When a note is made payable at a bank, the general rule is that in order to charge the indorser the note should be presented for payment at the bank during its customary business hours, for if the holder goes to the bank after those hours and finds it closed or no one there authorized to answer to the demand, he can make no valid demand and the indorser will be discharged: Parker v. Gordon, 7 East, 385; Byles on Bills, 205, 206. In other cases the holder has the whole day to present the bill or note, the only limitation being that he must present it at a reasonable hour, and this may depend upon the circumstances of the case: Wilkins v. Jadis, 2 B. & Ad. 188. But even in the case of paper payable at bank, if after business hours the holder obtains admittance and finds in the bank a person authorized to answer, a demand of such person and refusal for want of funds will in general be sufficient: Bank of Syracuse v. Hollister, 17 New York, 46; Byles on Bills, 212 (ed. of 1836); Shepherd v. Chamberlain, 8 Gray, 225; Flint v. Rogers, 15 Maine, 67; Allen v. Avery, 47 Ib. 287; Henry v. Lee, 2 Chitty, 124; Garnett v. Woodcock, 1 Stark, 475.

In the present case the customary business hours of the bank at which the note was payable ended at four o'clock p. m. The note was not brought there for presentation until five p. m., but the holder was then admitted into the bank, and there found the cashier, of whom he demanded payment, which was refused on the ground that no funds had been left with the bank to pay the same. The only question raised in the case is as to the sufficiency of that demand under the special circumstances.

It is not disputed that the cashier was a proper person of whom to make the demand, but it is considered on the part of the appellant that there exists a feature in this case which distinguishes it from all those in which a demand after business hours has been held sufficient, viz., that up to the close of business hours on the day of the maturity the indorser had been endeavoring to find the note for the purpose of paying it, but that it was not at the bank, and it is claimed that if it had been presented at the bank during business hours it would have been paid. This claim is founded upon the finding of the Court that on the day the note fell due the indorser was ready to pay it, and sent the maker to the bank several times during banking hours to see if the note was there and ascertain the amount of the same, but was informed each time that the note was not in the bank.

It was stipulated on the trial that these inquiries were made to enable the indorser to pay the note, and that they were continued up to the time the bank closed, and we think the fair interpretation of the finding is that Burton, the indorser, had the funds wherewith to pay the note and endeavored to do so, but was prevented by the failure of the holder to present the note at the bank during business hours. The question now before us is whether those facts make the case an exception to the general rule that a valid demand can be made after business hours if the holder obtains admittance into the bank and there finds a person authorized to answer to the demand.

Had the maker gone to the bank prepared to pay the note, and waited there for that purpose until the close of business hours and then left, or had he placed funds in the bank and allowed them to remain there until the close of business hours, and then withdrawn them in consequence of the non-presentation of the note, we are of opinion that a subsequent presentation for payment would not have been sufficient to charge the indorser. The leading English case upon this subject is Parker v. Gordon, 7 East 387, decided in 1806, in which LORD ELLENBOROUGH says: "If a party choose to take an acceptance, payable at an appointed place, it is to be presumed that he will inform himself of the proper time for receiving payment at such place, and he must apply accordingly, and, if by going there out of due time the bill be not paid, it is his own fault, and he cannot

proceed as upon a dishonor of it. * * * It is fishing for the dishonor of a bill made payable at a banker's to present it there for payment at a time when it is known, in the usual course of business, that it cannot be paid."

This decision was followed in 1813, in Elford v. Teed, 1 Maule & Selw. 28, where the business hours of a bank are compared to the horae juridicae of the Courts of Justice.

The first case in which this rule was qualified is Garnett v. Woodcock, 1 Starkie, 475, where LORD ELLENBOROUGH, in 1816, held, at nisi prius, that a presentment at a banker's after banking hours was sufficient, provided a person was stationed there by the banker to return an answer.

Upon these cases are founded all those which follow upon the subject of the presentment of commercial paper made payable at a bank.

It is to be observed that in the two cases first cited (Parker v. Gordon and Elford v. Teed) the action was brought by the indorsee of a bill of exchange against the drawer, and the drawer was held to be discharged by the failure to present the bill during business hours; while in the last case (Garnett v. Woodcock) the action was against the acceptor. In this State, where a note or bill is payable at a particular time and place, a demand at the place appointed is not necessary to sustain an action against the acceptor or maker: Wolcott v. Van Santvoord, 17 Johns. 248; Caldwell v. Cassidy, 8 Cow. 271. But in England, at the time of the decision in Garnett v. Woodcock (though since changed by statute), such demand was necessary: Bowes v. Howe, 5 Taunt. 30; Sanderson v. Bowes, 14 East. 500; Dickinson v. Bowes, 16 Ib. 108; Rowe v. Young, 2 B. & B. 165; s. c., 2 Bligh, 391—a doctrine to which LORD ELLENBOROUGH had been, individually, decidedly adverse: Lyon v. Sundius, 1 Camp. N. B. 423. The presentment in Garnett v. Woodcock, was at eight in the evening, to a boy, who replied that he had no orders, and this was held by LORD ELLENBOROUGH sufficient, in an action against the acceptor. But had the action been against the drawer, and had he shown that the acceptor had funds and would have paid the bill in case it had been presented during business hours, the decision would probably have been different. In The Bank of Syracuse v. Hollister, 17 N. Y. 46, where the presentment was out of business hours, stress

is laid upon the facts that no person had inquired for the note during business hours, and that the maker had no funds in the bank, and in none of the cases, where a demand out of business hours has been sustained, does it appear that any effort had been made to pay the note, except in the case of The Bank of Utica v. Smith, 18 J. R. 230, and Newark India Rubber Mfg. Co. v. Bishop, 3 E. D. Smith, 48. The case in 18 Johnson was decided upon the ground that the presentment was in fact made during business hours, and that the person having the funds should have waited the customary fifteen minutes after three, during which the bank was kept open for the presentment of paper. The case in 3 E. D. Smith presents the very point which arises in the one now at bar, and affords a clear illustration of it. That was an action against two indorsers of a note, payable at bank. One of the indorsers (Bishop) placed funds in the hands of the paying teller for the purpose of paying the note. These funds were not deposited to the credit of the maker, nor entered on the books of the bank; the teller was the agent simply of Bishop, the indorser, to pay the note if regularly presented. The teller remained at the bank until the close of business hours, and then left, the note not having been presented. After he had left the note was presented, and a clerk, being still there, examined the account of the maker, and not finding sufficient funds to his credit, answered, no funds. Bishop afterward, finding that the note had not been presented during business hours, withdrew the funds which he had placed in the hands of the paying teller.

A verdict having been rendered against both indorsers, WOODRUFF, J., refused to set it aside as to Bishop, but did set it aside as to the other indorser, and afterward, in a very clearly reasoned opinion, delivered at general term, demonstrated the justice of his conclusion.

As to Bishop, he had himself undertaken to pay the note, and on learning that it had not been duly presented, withdrew the funds which he had appropriated to its payment. But as to the other indorser, the case was different. If the note had been presented within the usual business hours, it would have been paid out of funds provided either by the maker or the first indorser in his behalf, and the second indorser would have been discharged. It was by the omission of the holder thus

to present it, and from that cause alone, that the note was not paid at its maturity. The second indorser should not be held under those circumstances. In the case at bar, the finding is not that the maker was ready to pay, but that the defendant, the indorser, was endeavoring to pay the note. If he was provided with funds for that purpose he must have retained them. He knew that the note was not paid, and did not expect the maker to pay it, but had himself undertaken to do so. Under these circumstances, his readiness to pay does not, in our judgment, distinguish the case from that of The Bank of Syracuse v. Hollister, and those upon which it was based. The defendant cannot have sustained any injury, unless it be the expenses of protest, which are trifling, and about which no point seems to have been made at the trial.

The judgment should be affirmed, with costs.

Judgment affirmed.

Notice of Dishonor, Time for Sending.

LAWSON & COVODE v. FARMERS' BANK OF SALEM.

1 Ohio St. 206. 1853.

Error to the Court of Common Pleas of Columbiana County, reserved in the District Court for decision by the Supreme Court.

The original action was assumpsit, for recovery against Lawson & Covode, as indorsers of a bill of exchange, which is as follows:

"Wellsville, April 25, 1848.

"$4,000.00. Ninety days after date, pay to the order of Lawson & Covode, four thousand dollars, value received, and place the same to the account of

"Yours, etc. W. F. JORDAN.

"To J. Jordan & Son, Pittsburg,

"Pay to Farmers' Bank of Salem,

"LAWSON & COVODE."

"Accepted by J. Jordan & Son."

The declaration counts upon the instrument above mentioned, and also contains the common counts.

Pleas—Non-assumpsit.

It appears that this bill of exchange, which was drawn and indorsed in this State, was discounted by the Bank of Salem, and the money paid to the acceptors thereof; subsequently it was indorsed by the Bank of Salem to the Exchange Bank of Pittsburg, in the State of Pennsylvania, for collection, Jordan & Son, the acceptors, living in the city of Pittsburg. It matured in the hands of the Exchange Bank of Pittsburg on the 27th day of July, 1848, and being dishonored by the acceptors in Pittsburg, was protested for non-payment by Webb Closey, a notary public of that city. * * *

The bill of exceptions taken upon the trial shows that the defendants below excepted to the ruling of the Court as to the admissibility of the testimony to which they objected, and also to that part of the charge of the Court to the jury, which is as follows:

"It will be proper to consider further whether any legal notice was given and due diligence used to fix the liability of these defendants. If it appear from the proof that the demand was made on the 27th of July, the last day of grace, and payment refused, and that notice to the defendants of such demand and non-payment was deposited in the post-office at Pittsburg, at any time on the 28th of July, it was proper and sufficient notice. The law gives the entire day after the day of dishonor, which was the 27th of July, to the notary to deposit the notice in the post-office.

"It is therefore immaterial whether the notice in this case was deposited by the notary before the closing of the mail at the post-office at Pittsburg, before or after nine or ten o'clock A. M., of that day, if the notice is proven to be in the office on the 28th. And, moreover, if the proof satisfy the jury that the notice of the dishonor of this bill could not be conveniently deposited in the office on the 28th of July in time for the mail of that day (as we have already substantially said), then it was in proper time if said notice was deposited in time to be sent out by the next mail after the 28th of July. In this connection it may be proper to observe to the jury that the plaintiffs are in no way to be affected by the delays, mistakes, or oversights of the post-office or its agents. And, if it appear that the notice given or attempted to be given to these defendants was not sent by the direct mail from Pittsburg to Wellsville, but by the mail from

Pittsburg to Salem, and from thence to Wellsville, that fact will not defeat the plaintiff's right of recovery, if the notice to the defendants was deposited in the post-office at Pittsburg in proper time, directed to the Bank of Salem, and by that bank forwarded to the defendants at Wellsville, by the next mail, after the receipt of the said notice at Salem."

A verdict was returned for the plaintiff for $4,513.33; on which judgment was rendered by the Court of Common Pleas at the September Term thereof, 1850; to reverse which this writ of error is brought.

BARTLEY, J. * * * Touching the second question, then, did the Court of Common Pleas err in charging the jury that if the notice to the indorsers of the demand and non-payment of the bill was deposited in the post-office at Pittsburg at any time during the day after the day of dishonor, without regard to the time of the departure of the mail for that day, it would be sufficient notice; and, moreover, that if it was found inconvenient to deposit the notice in the post-office in time for the mail of that day, it was in proper time if the notice was deposited in time to be sent off by the next mail of the day next after the day following the day of the dishonor of the bill?

This involves a very important question of the law merchant, and it is not a little surprising that there should remain any doubt or uncertainty at this late day upon a question of such vital importance to the interest of commercial countries respecting the duties and liabilities of holders and parties to dishonored paper. And it is a matter of no small moment that a question which enters so largely as does this into the every-day business transactions of different commercial States and countries should be settled, not only upon a certain and unvarying, but also upon a uniform basis.

The liability of the indorser is strictly conditional—dependent both upon due demand of payment upon the maker or acceptor, and also due and legal notice of the non-payment. The purpose and object of such demand and notice is to enable the indorser to look to his own interest, and take immediate measures for his indemnity. The demand and notice being conditions precedent to the indorser's liability, it is incumbent on the holder to make clear and satisfactory proof of them before he can recover. The

plaintiffs in error in this case, being accommodation indorsers, may well insist upon strict proof of due diligence in giving notice of the dishonor of the bill.

The law does not require the utmost diligence in the holder in giving notice to the dishonor of a bill or note. All that is requisite is ordinary or reasonable diligence. And this is not only the rule and requirement of the law merchant, but a statutory provision of this State. But what amounts to due diligence or reasonable notice is, when the facts are ascertained, purely a question of law, settled "with a view to practical convenience and the usual course of business."

The question was at one time strenuously contested whether due diligence did not require that, where the parties reside in the same place, the notice of non-payment should be given on the day of the dishonor of the bill; and where the parties reside in different places, should be sent by the mail of that day, or the first possible or practicable mail after the default: Tindal v. Brown, 1 Term. R. 167; Darbishire v. Parker, 6 East. 3; Marius on Bills, 24. But the rule was established, and is supported by great weight of authority, that where the parties reside in different places, and the post is the mode of conveyance adopted, although it was in no case necessary to send the notice by the post of the same day of the dishonor, or of the knowledge of the dishonor, the holder being entitled to the whole of that day, being the day of the dishonor or knowledge of the dishonor, to prepare his notice, yet that the notice would be insufficient unless put into the post-office in time to go by the next mail after that day. And this is in conformity with the rule laid down by Mr. Chitty, in his learned treatise on bills of exchange, in the following explicit language: "When the parties do not reside in the same place, and the notice is to be sent by general post, then the holder or party to give the notice must take care to forward notice by the post of the next day, after the dishonor, or after he receives notice of such dishonor, whether that post sets off from the place where he is early or late; and if there be no post on such next day, then he must send off notice by the very next post that occurs after that day:" Chitty on Bills, 485.

This is in accordance with the rule as settled by the Supreme Court of the United States. In Lenox v. Roberts, 2 Wheaton, 373, Chief Justice MARSHALL says: "It is the opinion of the

Court that notice of the default of the maker should be put into the post-office early enough to be sent by the mail of the day succeeding the last day of grace." And in the case of The Bank of Alexandria v. Swan, 9 Peters, 33, Mr. Justice THOMPSON approved of the general rule laid down in the case of Lenox v. Roberts, holding that notice of the dishonor need not be forwarded on the last day of grace, but should be sent by the mail of the next day after the dishonor. The same rule was adopted by Mr. Justice WASHINGTON in the case of The United States v. Parker's Administrators, 4 Wash. R. 465, and in which case subsequently that decision was affirmed on error by the Supreme Court, 12 Wheat. 559. The same rule received the sanction of Mr. Justice STORY in the case of the Seventh Ward Bank v. Hanrick, 2 Story's R. 416. Although in the case of Mitchell v. Degrand, 1 Mason, 180, he appears to have been disposed to even greater strictness, holding that when a bill is once dishonored, the holder is bound to give notice by the next practicable mail to the parties whom he means to charge for the default. This, however, is explained by Mr. Justice WASHINGTON, in the case of United States v. Parker's Administrators, to mean that the notice should be put into the office in time to be sent by the mail of the succeeding day. This rule, adopted by the Supreme Court of the United States, and which is supported by the great weight of authority in England and in the several States of the Union in which the question appears to have been settled by reported adjudications, is subject to some qualification relaxing its rigor. If two mails leave the same day on the route to the place of the residence of the indorser, it is sufficient to deposit the notice in the post-office in time to go by either mail of that day, inasmuch as the fractions of the day are not counted: Whitewell v. Johnson, 17 Mass. R. 449, 454; Howard v. Ives, 1 Hill, N. Y. R. 263.

And for the reason that the mail of the day succeeding the day of the default may go out in some places soon after midnight, or at a very early hour in the morning, and is sometimes made up and closed the evening preceding, it has been adjudged that, inasmuch as the holder is allowed till the day after the day of default to send off the notice, reasonable diligence would not require him to deposit the notice in the post-office at an unseasonably early hour, or before a reasonable time can be had for

depositing the notice in the post-office after early business hours of that day. The rule, as qualified and settled by the late authorities, and which I take to be the correct one, is that, where the parties reside in the same place or city, the notice may be given on the day of default; but if given at any time before the expiration of the day thereafter, it will be sufficient; and when the parties reside in different places or States, the notice may be sent by the mail of the day of the default; but, if not, it must be deposited in the office in time for the mail of the next day, provided the mail of that day be not made up and closed at an unreasonably early hour. If, however, the mail of that day be closed before a reasonable time after early business hours, or if there be no mail sent out on that day, then it must be deposited in time for the next possible post. In the case of Downs v. Planters' Bank, 1 Smedes & Marshall's R. 261, and also the case of Chick v. Pillsbury, 24 Maine R. 458, the doctrine on this subject has been more fully examined than perhaps in any of the older cases; and the rule adopted is, that the notice, in order to charge the indorser living in another place or State, must be deposited in the post-office in time to be sent by the mail of the day succeeding the day of the dishonor, providing the mail of that day be not closed at an unreasonably early hour, or before early and convenient business hours. And this rule is well sustained by authority: Fullerton et al. v. The Bank of the U. S., 1 Peters, 605, 618; Eagle Bank v. Chapin, 3 Pick. 180, 183; Talbot v. Clark, 8 Pick. 51; Carter v. Burly, 9 New Hamp. 559, 570; Farmers' Bank of Maryland v. Duvall, 7 Gill & Johnson, 79; Freeman's Bank v. Perkins, 18 Maine, R. 292; Meade v. Engs, 5 Cowen, 303; Sewall v. Russell, 3 Wend. 276; Brown v. Ferguson, 4 Leigh, 37; Dodge v. Bank of Kentucky, 2 Marshall, 610; Hickman v. Ryan, 5 Littell, 24; Hartford Bank v. Steedman, 3 Connecticut R. 489; Brenger v. Wightman, 7 Watts & Serg. 264; Townsley v. Springer, 1 Louisiana R. 122; Bank of Natchez v. King, 2 Robinson, 243; Brown v. Turner, 1 Alabama R. 752; Lockwood v. Crawford, 18 Conn. 363; Bayley on Bills, 262; Story on Promissory Notes, § 325, and Byles on Bills, 160.

* * *

It is claimed on behalf of the plaintiffs in error in this case that the notice of the dishonor of the bill should have been sent immediately to them, instead of being sent, as it was in

the first place, to the Bank of Salem. The holder is not bound to give notice of the dishonor to any more than his immediate indorser. And each party to a bill has the same time, after notice to himself, for giving notice to other parties beyond him that was allowed to the holder after the default: Sheldon v. Benham, 4 Hill, N. Y. 129; Eagle Bank v. Hathaway, 5 Metcalf, 213. And when a bill is sent to an agent for collection, the agent is required simply to give notice of the dishonor in due time to his principal; and the principal then has the same time for giving notice to the indorsers, after such notice from his agent, as if he had been himself an indorser receiving notice from a holder: Bank of the U. S. v. Davis, 2 Hill's N. Y. R. 452; Church v. Barlow, 9 Pick. 547. The party in this case therefore was not at fault by sending the notice directly to the Bank of Salem, leaving that bank to send the notice to the plaintiffs in error.

Applying the rule therefore which we have adopted as the correct one to this case, it was incumbent on the plaintiff below, in order to be entitled to a recovery, to show that the notice of the dishonor of the bill was deposited in the post-office in Pittsburg in time to be sent by the mail of the 28th day of July. Ten minutes past nine o'clock in the morning was not an unreasonably early hour, or before a reasonable and convenient time after the commencement of early business hours of the day. The neglect therefore to send the notice by the mail of the next day after the day of the default operated to discharge the plaintiffs in error as indorsers, unless from some other cause notice had been dispensed with or rendered unnecessary. And for the charge of the Court of Common Pleas to the jury for the contrary, the judgment is reversed and the cause remanded for further proceedings.

Judgment of Common Pleas reversed.

LEADING ILLUSTRATIVE CASES LAW OF SURETYSHIP AND GUARANTY

PART I

INTRODUCTORY TOPICS

CHAPTER I.

CONTRACT DEFINED AND EXPLAINED.

Suretyship and Guaranty Defined and Distinguished.

CAMPBELL v. SHERMAN (Homet's Appeal).

151 Pa. St. 70. 1892.

Appeal from court of common pleas, Sullivan County; John A. Sittser, Judge.

Contest between J. A. Homet, claimant, and other lien creditors of Adam Sherman, upon distribution of a fund arising from a sheriff's sale of the real estate of said Sherman. From a judgment allowing Homet's claim in part only, he appeals. Reversed.

McCOLLUM, J. On the first of January, 1887, J. A. Homet, the appellant, bought of Adam Sherman two judgments against A. R. Robbins, on which there was then an unpaid balance of $592.38, and they were duly assigned to him. At the same time he loaned to Sherman $266.62. To secure the payment of the judgments and the money loaned he received the bond of Sherman in the sum of $859, on which, by virtue of the warrant of attorney contained therein, judgment was entered Jan. 3, 1887. On a distribution of the proceeds of a sale by the sheriff on the 13th of September, 1890, of the real estate of Sherman, the appellant claimed to apply on his judg-

ment the fund remaining after paying costs and prior liens. The subsequent lien creditors of Sherman admitted that the appellant was entitled to receive the sum loaned, with interest thereon, but contended that Sherman was released from liability as to the balance because of the appellant's failure to revive the Robbins judgments. To this the appellant answered that his omission to revive these judgments did not release Sherman, and that, if it did, the creditors could not take advantage of it on distribution. The conclusion reached by the learned auditor was that he could not, at the instance of the lien creditors, set aside or disregard the judgment on the showing before him, but that Sherman might, in an appropriate proceeding, rely on the appellant's negligence as a defense to it. The learned president of the common pleas thought that this defense could be successfully made before the auditor by the lien creditors, and the fund was accordingly awarded to them.

In reviewing the decision of the court below, the first important inquiry is whether the obligation of Sherman in respect to the Robbins judgments was that of a surety or of a guarantor. If he was a surety, he was not released from liability by the negligence of the appellant, and the contention concerning the powers of the auditor has nothing to rest upon. It is well settled that mere forbearance, however prejudicial to a surety, will not discharge him, and that the failure of a creditor to revive a judgment does not release the surety, unless there was an express agreement that it should be kept revived for his benefit. Winton v. Little, 94 Pa. St. 64; U. S. v. Simpson, 3 Pen. & W. 437.

We think the undertaking of Sherman was that of a surety. His bond included the money loaned and the balance due on the Robbins judgments, and by its express terms was to remain in force until the whole sum was paid. The written conditions in the bond define the liability of the obligor, and we cannot add to them by implication a condition which would render them nugatory. The written condition applicable to this contention is that, if the judgments "shall be paid in full by the said A. R. Robbins, his heirs and assigns, to the said J. A. Homet, then this obligation to be void, otherwise to be and remain in full force and virtue."

The appellant purchased the judgments on the agreement of his vendor to pay them if Robbins did not. It was a contract of suretyship, and not of technical guaranty, on which he parted with his money. On the failure of Robbins to pay the judgments at maturity, he was at liberty to proceed directly against the surety. He was not bound to resort to legal proceedings against Robbins or to show that they would have been unavailing in order to sustain process upon the bond. He was under no legal duty to the surety to revive the judgments, unless requested to do so, and, as no such request was made, negligence in this particular cannot be imputed to him. The law on this subject is stated by Agnew, J., in Reigart v. White, 52 Pa. St. 440, as follows:

"A contract of suretyship is a direct liability to the creditor for the act to be performed by the debtor, and a guaranty is a liability only for his ability to perform this act. In the former the surety assumes to perform the contract of the principal debtor if he should not, and in the latter the guarantor undertakes that his principal can perform—that he is able to do so. From the nature of the former, the undertaking is immediate and direct that the act shall be done which if not done makes the surety responsible at once; but from the nature of the latter, non-ability, in other words insolvency, must be shown."

In Kramph's Ex'x v. Hatz's Ex's, Id. 525, Woodward, C. J., discussing the same subject said: "The contract of a guarantor is to be carefully distinguished from that of a surety, for whilst both are accessory contracts, and that of a surety in some sense conditional, as that of a guarantor is strictly so, yet mere delay to sue the principal debtor does not discharge a surety. The surety must demand proceedings, with notice that he will not continue bound unless they are instituted. Cope v. Smith, 8 Serg. & R. 110.

"By his contract he undertakes to pay if the debtor do not; the guarantor undertakes to pay if the debtor cannot. The one is an insurer of the debt: the other, an insurer of the solvency of the debtor. It results as a matter of course out of the latter contract that the creditor shall use diligence to make the debtor pay, and, failing this, he lets go the guarantor." The foregoing extracts from the opinions of eminent

Pennsylvania jurists draw with remarkable clearness and precision the distinction between a contract of suretyship and a contract of guaranty, and accurately define the respective rights and obligations of a surety and a guarantor. There has been no departure by this court from the principles announced in them, and they sustain the contention of the appellant that his omission to revive the Robbins judgment did not affect Sherman's liability on his bond. It follows that it was error to award the fund to the subsequent lien creditors.

Decree reversed, and record remitted to the court below, with direction to distribute the fund in accordance with this opinion; the costs of this appeal to be paid by the appellees.

SMITH v. SHELDEN ET AL.

35 Mich. 42, 24 Am. Rep. 529. 1876.

COOLEY, C. J. The legal questions in this case arise upon the following facts:

Prior to June, 1867, Eldad Smith, Isaac Place, and Francis B. Owen were partners in trade under the firm name of Place, Smith & Owen, and as such became indebted to defendants in error in the sum of $969 on book account.

In the month mentioned the firm was dissolved by mutual consent, Place purchasing the assets of his copartners and agreeing to pay off the partnership liabilities, including that to the defendants in error. On the second day of the following month Place informed the defendants in error of this arrangement, and that he had taken the assets and assumed the liabilities of the firm, and they, without the consent or knowledge of Smith and Owen, took from Place a note for the amount of the firm indebtedness to them, payable at one day with ten per centum interest. They did not agree to receive this note in payment of the partnership indebtedness, but they kept it and continued their dealings with Place, who made payments upon it. The payments, however, did not keep down the interest. Place, in 1872, became insolvent and made an assignment, and Smith was then called upon to make payment of the note. This was the first notice he had that he was looked to for payment. On his declining

to make payment suit was brought on the original indebtedness and judgment recovered.

The position taken by the plaintiffs below was, that as they had never received payment of their bill for merchandise they were entitled to recover it of those who made the debt, the giving of the note which still remained unpaid being immaterial.

On behalf of Smith it was contended that, by the arrangement between Place and his copartners, the latter, as between the three, became the principal debtor, and that from the time when the creditors were informed of this arrangement they were bound to regard Place as principal debtor and Smith and Owen as sureties, and that any dealing of the creditors with the principal to the injury of the sureties would have the effect to release them from liability. And it is further contended that the taking of the note from Place, and thereby giving him time, however short, was in law presumptively injurious.

Upon this state of facts the following questions have been argued in this court:

1. Was the note given by Place in the copartnership name for the copartnership indebtedness, but given after the dissolution, binding upon Smith and Owen?

2. If Smith and Owen were not bound by the note, were they entitled to the rights of the sureties? And

3. Did the taking of the note given by Place discharge Smith and Owen from their former liability?

On the first point it is argued in support of the judgment that when a copartnership is dissolved the partner who is entrusted with the settlement of the concern should be held to have implied authority to give notes in settlement. On the other hand it is insisted that in law he has no such authority, and that if he assumes, as was done in this case, to give a note in the partnership name, it will in law be his individual note only.

Whatever might be the case if the obligation which was given had been a mere acknowledgment of the amount due, in the form of a due bill or I O U, we are satisfied that there is no good reason for recognizing in the partner who is to adjust the business of the concern any implied authority to ex-

ecute such a note as was given in this case. This note was something more than a mere acknowledgment of indebtedness; and it bore interest at a large rate. It was in every respect a new contract. The liability of the parties upon their indebtedness would be increased by it if valid, and their rights might be seriously compromised by the execution of paper payable at a considerable time in the future if the partner entrusted with the adjustment of their concerns were authorized to make new contracts. It was assumed in F. & M. Bank v. Kercheval, 2 Mich. 506-519, that the law was well settled that no such implied authority existed, and we are not aware that this has before been questioned in this state. See Pennoyer v. David, 8 Mich. 407. We think it much safer to require express authority when such obligations are contemplated, than to leave one party at liberty to execute at discretion new contracts of this nature, which may postpone for an indefinite period the settlement of their concerns, when a settlement is the very purpose for which he is to act at all.

For a determination of the question whether Smith and Owen were entitled to the rights of sureties, it seems only necessary to point out the relative position of the several parties as regards the partnership debt. Place, by arrangement, had agreed to pay this debt, and as between himself and Smith and Owen, he was legally bound to do so. But Smith and Owen were also liable to the creditors equally with Place, and the latter might look to all three together. Had they done so and made collections from Smith and Owen, these parties would have been entitled to demand indemnity from Place. This we believe to be a correct statement of the relative rights and obligations of all.

Now a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities, as is often the case when notes are given or bonds taken; The relation is fixed by the arrangement and equities between the debtors or obligors,

and may be known to the creditor, or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but if he knows that one party is surety merely, it is only just to require of him that in any subsequent action he may take regarding the debt, he shall not lose sight of the surety's equities.

That Smith and Owen were sureties for Place, and the latter was principal debtor after the dissolution of the copartnership, seems to us unquestionable. It was then the duty of Place to pay this debt and save them from being called upon for the amount. But if the creditors, having a right to proceed against them all, should take steps for that purpose, the duty of Place to indemnify, and the right of Smith and Owen to demand indemnity, were clear. Every element of suretyship is here present, as much as if, in contracting an original indebtedness, the contract itself had been made to show on its face that one of the obligors was surety merely. As already stated, it is immaterial how the fact is established, or whether the creditor is or is not a party to the arrangement which establishes it.

This view of the position of the parties indicates clearly the right of Smith and Owen to the ordinary rights and equities of sureties. The cases which have held that retiring partners thus situated are to be treated as sureties merely, have attempted no change in the law, but are entirely in harmony with older authorities which have only applied the like principle to different states of facts, where the relative position of the parties as regards the debt was precisely the same. We do not regard them as working any innovation whatever. The cases we particularly refer to are Oakley v. Pasheller, 4 Cl. & Fin., 207; Wilson v. Loyd, Law R., 16 Eq. Cas., 60; and Millerd v. Thorn, 56 N. Y. 402.

And it follows as a necessary result from what has been stated, that Smith and Owen were discharged by the arrangement made by the creditors with Place. They took his note on time, with knowledge that Place had become the principal debtor, and without the consent or knowledge of the sureties. They thereby endangered the security of the sureties, and as the event has proved, indulged Place until the security became of no value. True, they gave but very short time in the first

instance; but, as remarked by the vice chancellor in Wilson v. Loyd, L. R., 16 Eq. Cas. 60, 71, "the length of time makes no kind of difference." The time was the same in Fellows v. Prentiss, 3 Denio 512, where the surety was also held discharged. And see Okie v. Spencer, 2 Whart. 253. But that indulgence beyond the time fixed was contemplated when the note was given is manifest from the fact that it was made payable with interest. In a legal point of view this would be immaterial, but it has a bearing on the equities, and it shows that the creditors received or bargained for a consideration for the very indulgence which was granted, and which ended in the insolvency of Place. When they thus bargain for an advantage which the sureties are not to share with them, it is neither right nor lawful for them to turn over to the sureties all the risks. This is the legal view of such a transaction, and in most cases it works substantial justice.

The judgment must be reversed, with costs, and a new trial ordered. The other Justices concurred.

The Necessity for Consideration.

BANK OF CARROLLTON, MISS., v. LATTING.

130 Pac. 144 (Okla.). 1913.

SHARP, C. On May 17, 1906, the Carrollton Cotton Oil Company, a corporation, engaged in the manufacture of cotton seed products at Carrollton, Miss., was overdrawn in its account with the plaintiff, the Bank of Carrollton. On said day said milling company executed to said bank its demand note for $948.86; that being the amount of its overdraft. This note was signed, "The Carrollton Cotton Oil Co., R. G. Latting, Jr., Sec. & Mgr.," by Mr. Latting, and on the day of its execution was delivered to the bank. Latting was at the time a stockholder in the mill company, and was also its secretary and manager. Some 10 days after the note was executed and delivered to the bank's cashier, at the cashier's request, Mr. Latting signed the note individually. At the same time it appears that Latting told the cashier of certain collaterals owned by the mill company that he would put up as collateral security for the company's note. This, however,

was not requested by the bank, but was volunteered by Latting acting for the mill company. These collaterals consisted of some accounts, and two bills of lading for two carloads of cotton seed, issued to the mill company by the Southern Railway Company. The giving of the note took up the mill company's overdraft. This it appears, was all the bank at the time required in the way of a settlement of the mill company's indebtedness. As testified to by Mr. Latting: "The cashier of the bank called my attention to the fact that the mill had overdrawn some $900 or more, and asked me to close it up with a note, which I did."

[1] The transaction between the principal, the mill company, and the creditor, the bank, upon the execution and delivery of the note, thereupon became an executed one, and apparently the bank was satisfied with the manner in which the transaction was closed. It had extended credit to the mill company by permitting it to overdraw its account, and accepted its demand note in settlement of the overdraft. It does not appear that, at the time of the execution and delivery of the note, any request for security in any form was made. The subsequent undertaking of the defendant, Latting, was, therefore, a collateral one. The indebtedness was that of the mill company. There must, of legal necessity, be a sufficient consideration in order to render valid the contract of suretyship or guaranty. This consideration is usually either of benefit to the principal or surety, or of detriment to the creditor. But where the consideration between the principal and the creditor has passed and become executed before the contract of the surety or guaranty is made, and such contract was no part of the inducement to the creation of the original debt, such consideration is not sufficient to sustain such contract. The rule is a very general one, and authorities in support thereof are manifold. Briggs v. Downing, 48 Iowa 550; Farnsworth v. Clark, 44 Barb. (N. Y.) 601; Simmang v. Farnsworth (Tex. Civ. App.), 24 S. W. 541; Baker v. Wahrmund, 5 Tex. Civ. App. 268, 23 S. W. 1023; Bluff Springs Mercantile Co. v. White (Tex. Civ. App.), 90 S. W. 710; Martin v. Stubbings, 20 Ill. App. 381; Anderson v. Norvill, 10 Ill. App. 240; Davidson v. King, 51 Ind. 224; Beall v. Ridgeway, 18 Ala. 117; Rudulph v. Brewer, 96 Ala. 189, 11 South. 314; Kissire v.

Plunkett-Jarnell Grocery Co. (Ark.), 145 S. W. 567; Comstock v. Breed, 12 Cal. 286; Levorene v. Hildreth, 80 Cal. 139, 22 Pac. 72; Lewin v. Barry, 15 Colo. App. 461, 63 Pac. 121; Jackson et al. v. Cooper (Ky.), 39 S. W. 39; Sawyer v. Fernald, 59 Me. 500; Cutler v. Everett, 33 Me. 201; Tenney v. Prince, 4 Pick. (Mass.) 387, 16 Am. Dec. 347; Ford v. McLain, 164 Mo. App. 174, 148 S. W. 190; Macfarland v. Heim, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629; Pfeiffer v. Kingsland, 25 Mo. 66; Williams v. Williams, 67 Mo. 661; Barnes et al. v. Van Keuren, 31 Neb. 165, 47 N. W. 848; Leonard v. Vredenburgh, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317; Gilman v. Kibler, 5 Humph. (Tenn.) 19; Clark v. Small, 6 Yerg. (Tenn.) 418; Russell v. Buck, 11 Vt. 166; In re Estate of Goddard, 66 Vt. 415, 29 Atl. 634; Randolph on Commercial Paper, § 920; Brandt on Suretyship and Guaranty, § 26; 6 Am. & Eng. Enc. L. 691, 692.

[2] It is insisted, however, by counsel that the transaction of May 17th, together with that which subsequently took place when the note was signed by Latting, constituted a single transaction, and was therefore not completed until the date of the latter occurrence. This contention finds no support in the evidence. That the mill company complied fully with the bank's demand on the day that the note was given is unchallenged. There was no request or agreement on that date that Latting should personally indorse the note, or that the mill company should deposit collateral. It is therefore unnecessary for us to give further consideration to this contention. The note was executed and made payable in the state of Mississippi, and the Supreme Court of that state, in Clopton, Ex'r, v. Hall, 51 Miss. 482, in a case where the surety signed the note several months after its original execution, said: "If such indorsement was contemporaneous with the making of the note, it will connect itself with that contract, and will be supported by its consideration; but if subsequent thereto, and not done in pursuance of an agreement for the credit of the maker, and for the security of the payee, it must rest upon a consideration of its own; otherwise it is nudum pactum. Moies v. Bird, 11 Mass. 436 [6 Am. Dec. 179]; Hunt v. Adams, 5 Mass. 358 [4 Am. Dec. 68]; White v. Howland, 9 Mass. 314 [6 Am. Dec. 71]; Miller v. Gaston, 2 Hill

(N. Y.) 190; Hough v. Gray, 19 Wend. (N. Y.) 202; Leonard v. Sweetzer, 16 Ohio 4."

[3] It was there held that the burden of proof as to the consideration of a note rests upon the plaintiff, where it is not by law implied, and that the subsequent signing of a note by a surety, after its delivery, constitutes a separate agreement, and the consideration is not imported by the indorsement itself, but it must be shown aliunde. This we believe to be the general rule in such cases, when there is an issue as to the consideration. Norton on Bills and Notes, 260; Pratt et al. v. Hedden, 121 Mass. 116. Nor does the letter written by the defendant to the bank's cashier, of date August 21, 1906, in any manner affect his liability, as it was as much nudum pactum as the note. Savage v. First Nat. Bank, 112 Ala. 508, 20 South. 398.

It not appearing that there was any consideration for the defendant's contract of suretyship or guaranty, the judgment of the trial court should be affirmed.

Commissioner Ames did not participate in the consideration of this cause.

Per Curiam. Adopted in whole.

The Requirements of the Statute of Frauds.

GIBBS ET AL. v. BLANCHARD.

15 Mich. 292. 1867.

[The facts and the exceptions to the rulings and the charge of the court are stated in the opinion.]

CHRISTIANCY, J. The main question in this case is whether the promise of Gibbs (one of the defendants below) comes within the second clause of the second section of our statute of frauds, as a "special promise to answer for the debt, default or misdoings" of Daily, the other defendant.

The declaration contains a special count upon the contract, and the common counts for goods sold and delivered. The special count sets forth that, "in consideration that said plaintiff agreed to sell to the said Daily a certain horse which the plaintiff then and there had, of the value of sixty dollars,

undertook and promised the said plaintiff to make, sign and deliver their promissory note to said plaintiff or bearer, in the sum of sixty dollars, for the purchase price of said horse, which said promissory note was to be payable thereafter, in six months from date." It further alleges that the plaintiff, relying upon said promise of said defendants, and in consideration thereof, did sell and deliver the horse to said John Daily, for the price of sixty dollars. The breach alleges the failure and refusal to make and deliver the note, as well as the refusal to pay the money.

It was clear, from the evidence, that the horse was bought for the benefit of, and delivered to Daily, and that the plaintiff would not have sold the horse on the credit of Daily alone. But upon the question, whether Daily and Gibbs were to give a joint note, or whether the latter was only to indorse the note of the former, or to become his guarantor, the evidence was conflicting.

There was evidence from which the jury might have found a joint promise, or, in other words, a promise by both to execute and deliver to the plaintiff a joint note for the price; and from the circumstances and subsequent acts of the parties, the jury might have been authorized to find that the note was to be made payable in six months, though they might also have found that no particular time was mentioned or expressly agreed upon for which the note was to run.

The evidence tending to show that the promise was joint, or that a joint note was to be given, was substantially this: Gibbs and Daily called upon the plaintiff together, and Gibbs asked plaintiff if he wanted to sell his mare. Plaintiff said he did. Gibbs inquired the price, and being told sixty dollars, wanted to know if plaintiff would take Daily's note if he, Gibbs, would sign it and see it paid; to this plaintiff assented. The mare not being present, and Gibbs, being anxious to get home, said Daily might go with plaintiff and see the mare, and if the mare suited him he might fetch her back with him and draw up a note and Daily might sign it, and the first time he, Gibbs, went to town he would sign it. The mare was delivered to Daily, who signed a note for it at six months, which was afterwards endorsed by Gibbs on Sunday. This note was produced on the trial and tendered back to defendants.

The court charged the jury that "if it was the understanding of the parties that Daily was the purchaser, and that he should give his note to the plaintiff for the price, and that Gibbs should so sign as only to be liable as indorser, the plaintiff must fail. If, however, the understanding of the parties was, at the time, that Gibbs and Daily were the buyers of the mare, and that both were to be liable as purchasers for the purchase price, and, accordingly, should become joint makers of a promissory note for its payment, though Daily was no less relied upon by the plaintiff than Gibbs, and though, in point of fact, it was understood that the mare, when bought, should belong to Daily, the plaintiff is entitled to recover. That the principle in this class of cases is, that if the agreement be such that two persons, in the purchase of goods, do at the same time become co-debtors to the seller for the price, then both are purchasers, and the case is not within the statute of frauds, and no memorandum in writing is necessary. But if it be such that one, at the time, becomes debtor to the seller, and the other security only for the debt, it is within the statute of frauds, and the undertaking of the security is void unless a memorandum of it in writing is made."

Though the question is one requiring some accuracy of discrimination, I have come to the conclusion, after a careful examination of the authorities, that the charge of the court was not only correct, but that it expresses the true rule of law applicable to the question with remarkable clearness.

No question can arise as to the sufficiency of the consideration for the undertaking of Gibbs, whether original or collateral, within or without the statute. Without his promise, the plaintiff would not have parted with his property. The consideration, therefore, is equally as good in law as a sale of the horse to him alone would have been for his sole promise to pay the price.

The plain ordinary meaning of the language used in this clause of the statute would seem sufficiently to indicate that the class of special promises required to be in writing includes only such as are secondary or collateral to, or in aid of the undertaking or liability of some other party whose obligation, as between the promisor and promisee, is original or primary. If there be no such original or primary undertaking

or liability of another party, there is nothing to which the promise in question can be secondary or collateral, and the promise is, therefore, original in its nature, and not within the statute. In other words, the statute applies only to promises which are in the nature of guaranties for some original or primary obligation to be performed by another. This has been settled by a remarkably uniform course of decision since the passage of the statute (29 Car. II, chap. 3, § 4), which does not essentially differ from our own and those of most of the states of the Union. So numerous and so uniform have been the decisions upon this point, that it would savor of affectation to cite them. They will be found cited in most of the elementary treatises. See Browne on Stat. Frauds, chap. 10; Chitty on Cont., p. 442 et seq.; 2 Pars. on Cont. (4th ed.), 301. And though the terms *original* and *collateral* have been criticised, yet when used, the one to mark the obligation of the principal debtor, the other that of the person who undertakes to answer for such debt, they are strictly correct, and give the true view of this clause of the statute. Mallory v. Gillett, 21 N. Y. 412, 414; Browne on Stat. Frauds, chap. 10, § 192.

As a result of this principle, that one must be held originally or primarily, and the other only collaterally, or in default of the former it follows that the statute only applies to such promises made in behalf or for the benefit of another, as would, if valid, create a distinct and several liability of the party thus promising, and not a joint liability with the party in whose behalf it is made. For if one be bound in the first instance and at all events, and the other only contingently, or on default of the first, the liability could not be joint. On the other hand, if the promise or the obligation of the two be joint, as between them, on the one side and the promisee on the other, then neither is collateral to the other, and such joint promise is original as to both. Hence it has been held in England that an agreement to convert a separate into a joint debt is not within the statute; the effect being to create a new debt, in consideration of the former being extinguished. Ex parte Lane, 1 De Gex. 300; Brown on Stat. of Frauds, 193.

Where the question arises (as it has in almost all the cases) as one of the several liability of the party promising in behalf of another (as for the price of goods sold to another), the true

rule undoubtedly is, that if the latter (to whom the goods are sold) be liable at all, then the promise of the former is collateral, and must be in writing; because, from the very nature of such a case, the party to whom the goods are sold, and in whose behalf the promise is made, is the principal debtor, and because it would be manifestly unreasonable to hold that both were in such cases *severally* liable as principals, as upon several original undertakings at the same moment. See Hetfield et al. v. Dow, 3 Dutcher 440; Dixon v. Frazee, 1 E. D. Smith 32. And this rule applies equally when the promise is made in reference to a preëxisting liability of another, if the plaintiff in accepting the promise does not release the principal. In reference to all such cases the authorities may be said to be entirely uniform. But the rule thus established as to cases where the question is one of the *several liability* of the party making the special promise, can, I think, have no application to the question of a joint liability upon a joint promise of the two. The only intimation to the contrary which I have seen is to be found in a dictum of Judge Catron in Matthews v. Milton, 4 Yerg. 576, a case in which no such question was involved, there being no evidence tending to show a joint promise. To say that when the party originally owing the debt, or for whom goods are purchased and to whom they are delivered, is liable at all, no other person can be held severally liable unless the promise be in writing, is merely saying that such promise is collateral, and, therefore, within the statute. But to say that they cannot both become jointly liable upon their joint promise, not in writing, to pay such debt or the price of such goods, if the party originally owing the debt or receiving the goods be at all liable, is but another form of declaring that it is *not competent* for both to become original promisors, as between them and the promisee, unless both are under an equal obligation, as *between themselves,* for the ultimate payment of the debt. Such a proposition, it seems to me, can not be maintained either upon principle or authority. Such an objection to a joint promise seems rather to have reference to some supposed defect of consideration (a question entirely distinct from the statute) than to the promise. And, if the party promising jointly with another to whom goods are furnished, can not be bound jointly with the latter, because,

as between the two promisors, he, not having received the goods, is under no obligation to pay; then the same reason ought to operate with still greater force against his *several* promise to pay the *whole* price of goods received by the other. But the law in the latter case is well settled the other way.

It was very correctly remarked by Whelply, J., in Hetfield et al. v. Dow, above cited, that, "to settle the rights of promisors inter sese, to ascertain as *between them* who is to pay the debt ultimately, is no part of the object of the act. It by no means follows that he who by the arrangement between the promisors ultimately may be bound to pay the debt is, as to *the promisee,* the principal debtor. That does not concern him." This view, it seems to me, rests upon sound reasons—reasons which must naturally enter into the consideration of business men, in the ordinary transactions of business. Where a party has been willing to put himself in the position of an original promisor (either jointly or severally) to a vendor for goods purchased for the benefit of, or delivered to, another, the vendor has a right conclusively to presume that such relations or arrangements exist between the two as to make it the duty of the party or parties promising, as between themselves, to pay according to the promise. And to allow the contrary to be shown to defeat the promise would operate as a fraud upon the vendor.

The question of a joint promise appears to have been seldom raised for adjudication in connection with the statute of frauds; but the following cases fully sustain the proposition that a joint promise of two, whether to pay the preëxisting debt of one of them, or a debt contracted at the time for his benefit (as for goods bought for and delivered to the one), does not come within the statute, but it is an original promise, as between them and the promisee, and valid without writing. Ex parte Lane, 1 De Gex. 300; Wainwright v. Straw, 15 Vt. 215; Stone v. Walker, 13 Gray 613; and Hetfield v. Dow, 3 Dutcher 440. See also by analogy Batson v. King, 4 H. & N. 739. The same doctrine is laid down by Mr. Browne in his able treatise on the statute of frauds (chap. 10, § 197).

It is true that in Wainwright v. Straw, which most resembles the present case, the decision is placed in part upon the ground that the sale was made to both. The facts were that

Straw and Cunningham both went to plaintiff's store and said they wished to buy a stove for Straw, but that both would be responsible. Now, I can see no difference in legal effect between the case where A and B say to a merchant, "We want to buy a stove for B, and both of us will be responsible," and the case where A says, "B wishes to purchase a stove, but we will both be responsible." *Substantially,* the transaction is the same; in both cases alike it is a sale for the benefit of the one on the joint credit of the two, and the real question in both cases is, whether the credit was given to both jointly. I do not think the court, in Wainwright v. Straw, based their decision upon the narrow and merely verbal ground of the use of the first person plural, showing merely who wanted the stove, but upon the broad ground above stated, that it was sold upon their joint credit. And in all such cases where the sale is upon the joint credit and promise of the defendants, though the property is purchased for and delivered to but one of them, I think the legal effect of the transaction constitutes, as between them and the vendor, a sale to the two jointly. The sale as between the vendor and the vendee is to the party or parties to whom the credit is given for the price, without reference to the question for whose use it is purchased, or who, as between the promisors, is to be its owner when bought.

This brings us to another point in the case. The sale (if upon the joint credit and promise of the defendants) was a joint sale to both, as between them and the plaintiff. But in the special count of the declaration it is alleged as a sale to Daily only. The plaintiff can not, therefore, recover upon the special count.

But upon the count for goods sold and delivered, the sale having been made to both, the plaintiff would be entitled to recover, if the facts be such as would warrant a recovery upon a sale made for the joint benefit of, and the property delivered to both.

I think there was no error in the charge or proceedings of the court below, and that the judgment should be affirmed, with costs.

PART II

RIGHTS OF THE SURETY

CHAPTER II.

THE RIGHT TO INDEMNITY AND CONTRIBUTION.

When the Surety May Bring Action for Indemnity.

DAVIES v. EVAN HUMPHREYS.

6 Meeson & Welsby 153 (Eng.). 1840.

PARKE, B. In these cases actions were brought by the plaintiff, one of the makers of a joint and several promissory note, dated the 27th of December, 1827, for the sum of £300, with interest, to recover from the two other makers, Evan Humphreys and John Humphreys, a part of the money paid by him to the payee, he having paid the whole. In the action against Evan Humphreys, the plaintiff claimed the whole, alleging that the defendant was the principal debtor. Against the defendant John Humphreys, he claimed a moiety of what he had paid, alleging that the defendant was a co-surety. There were two pleas—non assumpsit, and the Statute of Limitations; and on the trial at the spring assizes, before my Brother Coleridge, it appeared that the plaintiff had paid the whole of the debt and interest, of which the sum of £30 only was paid within six years before the commencement of the suit, the residue having been discharged before. For this sum the plaintiff recovered against Evan Humphreys, leave being reserved by the learned judge to move to increase the amount to the whole sum paid; against John Humphreys, the plaintiff recovered a moiety of £30, and permission was also given to move to increase that verdict. The rule for increasing the amount of the verdict against Evan Humphreys, the principal, must be discharged; for it is clear that each sum the plaintiff, the surety, paid, was paid in ease of the prin-

cipal, and ought to have been paid in the first instance by him, and that the plaintiff had a right of action against him the instant he paid it, for so much money paid to his use. However convenient it might be to limit the number of actions in respect of one suretyship, there is no rule of law which requires the surety to pay the whole debt before he can call for reimbursement. The consequence is, that the plaintiff's right of action against the principal must be limited to the full amount of all the payments within six years, and this being the amount for which the verdict was taken, the rule to enter a verdict for a larger sum must be discharged. Against the co-surety the case is different—the court will give it further consideration.

And now, in this term, the judgment of the court, on the remaining point in the action against John Humphreys, the surety, was delivered by

PARKE, B. A rule granted in this case, as well as one which was granted in another action on the same note against the principal, was argued in the sittings after Trinity Term. In the course of the last term, the court disposed of the rule in the latter action, and one of the questions in this; having reserved for further consideration the question, at what time the right of one co-surety to sue the other for contribution arises.

This right is founded not originally upon contract, but upon a principle of equity, though it is now established to be the foundation of an action, as appears by the cases of Cowell v. Edwards and Craythorne v. Swinburne; though Lord Eldon has, and not without reason, intimated some regret that the courts of law have assumed a jurisdiction on this subject, on account of the difficulties in doing full justice between the parties. What, then, is the nature of the equity upon which the right of action depends? Is it that when one surety has paid any part of the debt, he shall have a right to call on his co-surety or co-sureties to bear a proportion of the burthen, or that, when he has paid more than his share, he shall have a right to be reimbursed whatever he has paid beyond it? or must the whole of the debt be paid by him or someone liable, before he has a right to sue for contribution at all? We are

not without authority on this subject, and it is in favor of the second of these propositions. Lord Eldon, in the case of Ex parte Gifford, states, that sureties stand with regard to each other in a relation which gives rise to this right amongst others, *that if one pays more than his proportion,* there shall be a contribution for a proportion of the excess beyond the proportion which, in all events, he is to pay; and he expressly says, "that unless one surety should pay more than his moiety, he would not pay enough to bring an assumpsit against the other." And this appears to us to be very reasonable; for, if a surety pays a part of the debt only, and less than his moiety, he can not be entitled to call on his co-surety, who might himself subsequently pay an equal or greater portion of the debt: in the former of which cases, such co-surety would have no contribution to pay, and in the latter he would have one to receive. In truth, therefore, until the one has paid more than his proportion, either of the whole debt, or of that part of the debt which remains unpaid by the principal, it is not clear that he ever will be entitled to demand anything from the other; and before that, he has no equity to receive a contribution, and consequently has no right of action, which is founded on the equity to receive it. Thus, if the surety, more than six years before the action, have paid a portion of the debt, and the principal has paid the residue within six years, the Statute of Limitations will not run from the payment by the surety, but from the payment of the residue by the principal, for until the latter date it does not appear that the surety has paid more than his share.

The practical advantage of the rule above stated is considerable, as it would tend to multiplicity of suits, and to a great inconvenience, if each surety might sue all the others for a ratable proportion of what he had paid, the instant he had paid any part of the debt. But, whenever it appears that one has paid more than his proportion of what the sureties can ever be called upon to pay, then, and not till then, it is also clear that such part ought to be repaid by the others, and the action will lie for it. It might, indeed, be more convenient to require that the whole amount should be settled before the sureties should be permitted to call upon each other, in order to prevent multi-

plicity of suits; indeed, convenience seems to require that courts of equity alone should deal with the subject; but the right of action having been once established, it seems clear that when a surety has paid more than his share, every such payment ought to be reimbursed by those who have not paid theirs, in order to place him on the same footing. If we adopt this rule, the result will be, that here, the whole of what the plaintiff has paid within six years will be recoverable against the defendant, as the plaintiff had paid more than his moiety in the year 1831; and consequently the rule must be absolute to increase the amount of the verdict from £15 to £30.

Rules accordingly.

CHAPTER III.

THE RIGHT TO SUBROGATION AND EXONERATION.

Right to Be Subrogated to Securities Held by the Creditor.

PEARL v. DEACON.

24 Beav. 186 (Eng.). 1857.

THE MASTER OF THE ROLLS. I retain the opinion expressed by me yesterday. The facts are shortly these: Mr. Pearson applied to the defendants, who are brewers at Windsor, for a loan of £250, to enable him to take a public-house, called The Carpenters' Arms. They said we will do so if you will get a good surety for the amount, and assign over your pension and furniture. That was agreed to; Pearson offered the plaintiff as his surety for half the amount, and Castles as surety for the other half; the defendants accepted them, and on the 16th of November, 1852, two joint and several promissory notes were given to the defendants, one by Pearson and the plaintiff, and the other by Pearson and Castles. Six days afterwards, viz., on the 23d of November, Pearson assigned his pension and all the goods and chattels to secure this debt of £250. On this transaction, the first point which was raised by the plaintiff, in my opinion, fails. He says that this arrangement was a variation of the contract of suretyship, and that it discharged the plaintiff, because the money was made payable on the 16th of November, 1858, or six years after the

date of the mortgage. If the case had rested here, the plaintiff would probably have been successful, but the deed goes on, "or at such earlier or other time" as the defendants should appoint for the payment thereof "in and by notice in writing." I do not think that this was such a variation in the terms of the security as to discharge the surety; but the question is of little importance, as I am of opinion, on the evidence, that the plaintiff had notice of this assignment and of the terms of it.

The only other facts important to be stated are these: The defendants were landlords of The Carpenters' Arms, and in the year 1856, four years after this transaction, Pearson's rent being considerably in arrear, the defendants distrained and put a broker in possession of the furniture under the distress; on this, by arrangement, instead of selling the goods, they took them at a valuation of £116.

The question is this: The furniture having been expressly mortgaged for the £250, was it within the power of the defendants, to the injury of the surety, to give up the security on the furniture for the £250, and take it in discharge of another and different debt due to themselves? I am of opinion that they could not do so. It was said, that this security was not within the scope of the plaintiff's contract, and that a surety can not go beyond it. That is a mistake with respect to the relation between a principal and surety. Lord Eldon expressly stated, in Craythorne v. Swinburne, 14 Ves. 169, that the rights of a surety depend rather on a principle of equity than upon contract; there may be a *quasi* contract, but it arises out of the equitable relation between the parties, to be inferred from the knowledge of an established principle of equity. The same doctrine is also stated in Mayhew v. Crickett, 2 Swan. 191, and it is laid down distinctly, that sureties are entitled to the benefit of every security which the creditor has against the principal debtor, and that whether the surety knows of the existence of those securities or not is immaterial. If the creditor makes available any of his securities, the surety is entitled to the benefit of it.

The case of Capel v. Butler, 2 Sim. & S. 457, is a distinct authority for this proposition. Mr. Ellis sought to distinguish that case by saying, that, in that case, there was a recital of all

the securities, but that here was none. The answer, however is this: That there was notice to the surety of the whole transaction, and being so, the reciting it is immaterial. Lord Eldon distinctly laid down in Mayhew v. Crickett, 2 Swan. 185, that it is a matter of perfect indifference, whether the surety is aware of another security having been taken by the creditor or not.

In the judgment of Vice-Chancellor Wood in Newton v. Charlton, 10 Hare 651, there is a statement, in every word of which I concur. He says, as regards the creditor: "He is bound to give to the surety the benefit of every security which he holds at the time of the contract,—every security which he then holds; and he is not allowed, in any way, to vary the position of the surety with reference to those securities; that has been decided most distinctly in Mayhew v. Crickett by Lord Eldon, where there was a warrant of attorney in the hands of a creditor put into operation by the creditor, and a judgment obtained, from which he afterwards discharged the principal debtor. Lord Eldon held it utterly immaterial, whether the warrant of attorney was known to the surety at the time he entered into the contract or not. The surety had a complete right to the benefit of it, and if the benefit were lost to him, he was at once discharged."

It is argued that this was a security for a separate and distinct debt; but I am of opinion that it was not taken for a separate and distinct debt, but for the debt of £250.

I am of opinion, therefore, that if the defendants enforce payment of the rent due to them out of the furniture, and then seek to compel the plaintiff to pay the debt for which he became surety, the plaintiff is entitled to say to them, "you must give me the benefit of the security on the furniture and pension which were mortgaged to you for this debt."

What the defendants have done is this: They have thought fit to apply the produce of the furniture to a different and distinct debt, contrary to the original arrangement, on the terms of which, it is to be assumed, the surety consented to become liable. I am therefore of opinion, that whatever the defendants have received ought to be applied ratably in discharge of the whole debt, and that the plaintiff is only liable to pay half of the balance.

If it were otherwise, the result would be this: That if a man advanced £1,000 to another on a mortgage of an estate, and had the security of ten sureties, each of whom was liable for £100, he might release or reassign the mortgage, and then sue the ten sureties. This is a proposition impossible to be sustained.

If the defendants have received anything from Castles, it must not be taken into account; but with respect to the money received from Pearson, it ought to be taken as a discharge for the debt.

As to the pension, either they have received it or they have not; if they have, it was distinctly applicable to the payment of their debt; if they have not, they must show why they did not make that security available.

Surety for a Surety.

HARRIS v. JONES ET AL.

136 N. W. 1080 (N.D.). 1912.

Appeal from District Court, Richland County; Allen, J.

Action by Carl E. Harris against Martin Jones and another. From a judgment for plaintiff, defendants appeal. Reversed, with direction.

McCumber & Forbes, of Wahpeton, and Martin Scramstad, of Wyndmere, for appellants. Wolfe & Schneller, of Wahpeton, for respondent.

BURKE, J. In the spring of 1906, one Carl Tronsgard, a druggist of this state, was indebted to Noyes Bros. & Cutler, wholesalers, in the sum of $805.11. Being pressed for payment, he applied to Jones, the cashier of the local bank, to indorse a note for that amount, due in one year, and thus secure a year's extension upon his debt. Jones replied that owing to his position in the bank and his bonds he could not assume the risk unless he had security, and to use Jones' own words: "It happened that Tronsgard asked me to sign a note with him for about $800. Because of the business I was in, in the bank, it was unlawful: that is, it wouldn't be safe to do it. I told him, on account of my personal bonds, unless I had some

security to protect me, I says, 'If you get your brother-in-law, Harris, to sign that first, so there would be no risk on my part, I would sign,' and he said he would go and see him, and he brought back the note with his name on it, and I signed it." That Tronsgard related to Harris the substance of the conversation had with Jones is apparent from the testimony of Harris himself, wherein he says, in answer to a question: "Q. And didn't Tronsgard say that he first went to Jones to get him to sign the note, but that he wouldn't sign the note until you first signed it? A. Yes." And again he was asked: "Q. But, however, he did say that Martin Jones had said he wouldn't sign until you had signed? A. Yes, sir." And still again he was asked: "Q. What was the talk you had with Tronsgard about your signing that note, and Martin Jones signing it? A. He says Martin would sign, if I did. Q. Martin would sign if you signed it first? A. Yes, sir." That this was the understanding of both Harris and Jones further appears from the correspondence between these two persons written before the lawsuit was begun. At all events, the note was signed by Tronsgard as maker and indorsed upon the back first by Harris and next by Jones. Two others signed their names later, but their rights are not in litigation herein. When the note became due, it was not paid and was reduced to judgment, and an execution placed in the hands of the sheriff. When a threat of levy was made to Harris, he paid and caused to be satisfied of record the judgment, and took in his own name two notes from Tronsgard and his wife for the amount of the debt, which notes fell due in about six months' time. After the maturity of said notes, Harris sued Jones for contribution as a co-surety under § 6110, R. C. 1905, alleging that the Tronsgards and the other sureties were insolvent. The case is before us for trial de novo.

[1] (1) The first question arising is the relation of Jones to Harris. Counsel for both sides seem to act upon the assumption that they were co-sureties for all purposes, and the trial court naturally followed them. This relation existed, of course, between them, from the viewpoint of the payee of the note, Noyes Bros. & Cutler; but, when we come to consider the matter from the standpoint of Jones and Harris, a very different relationship exists. Jones had refused to extend his

name as a surety for Tronsgard alone. He told Tronsgard that he would not sign with him alone, but that if Harris would sign first, then he would sign. That Tronsgard told this to Harris there can be no doubt. Harris admits that Tronsgard told him that Jones would not sign the note until he (Harris) had signed it first. It thus appears that Jones was a surety upon the note for both Tronsgard and Harris, only bound to pay if neither of the others paid it. Of course, he could not assert this defense in a suit by the payee of the note; but that is not before us.

The first time this doctrine was announced, so far as we are able to learn, was in the case of Craythorne v. Swinburne, 14 Ves. 160, 33 English Reports (full reprints) 482; the facts in that case being almost identical with these. It was therein announced that, while the several persons signing their names as indorsers upon the back of a promissory note were liable to each other in the order in which they had signed, because the presumption was that each signer obligated himself upon the strength of all of the names before his, yet it might be shown by parol that all of the signers were in fact sureties for the original debtor alone, and consequently co-sureties with each other and liable to contribution. This principle was followed with very few dissents for nearly a hundred years; many of the cases being confused with the question of the liability towards the payee of the note, but, upon the simple question of the liability as between the co-sureties, being practically unanimous. To those wishing a full list of these decisions, we refer to 7 Cyc. 664-673. Thus stood the law when the various states, including North Dakota, adopted the Negotiable Instrument Law (sections 6303-6498, R. C. 1905). Section 6366, in particular, seems to have been intended by the framers of said law to give expression to the well-settled law upon that subject. It reads: "When a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties." Subdivisions 2 and 3 not being in point. Section 6370 reads: "As respects one another, indorsers are liable prima facie in the order in which they in-

dorse; but evidence is admissible to show that as between themselves they have agreed otherwise. Joint payees or joint indorsers who indorse are deemed to indorse jointly and severally."

[2] (2) From the established law, therefore, of our state it appears that prima facie, at least, Harris was liable to Jones for the full debt, in case Jones paid it, and liable to pay it himself in full without right of contribution from any subsequent indorser. Of course, he might show by evidence, parol or written, that such was not the true understanding, but that Jones meant to be bound for Tronsgard alone the same as did Harris; but this burden is upon Harris. The evidence already quoted shows that Harris offered no such evidence; but, on the contrary, the evidence received at the trial showed the very opposite, to wit, that Jones refused to be bound for Tronsgard alone. That this is the proper construction of the Negotiable Instrument Law is supported by the following named cases, arising upon a similar state of facts and based upon the same statute: Mercantile Bank v. Busby, 120 Tenn. 652, 113 S. W. 390; Haddock v. Haddock, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136 (valuable note by editors); Bank v. Burch, 145 N. C. 316, 59 S. E. 71; Wilson v. Hendee, 74 N. J. Law, 640, 66 Atl. 413; 7 Cyc. 673 (F), and cases cited note 84 to the same found in the Cyc. annotations.

Harris and Jones not being co-sureties upon the note in question, no cause of action existed in favor of Harris.

The trial court is directed to change the judgment of the lower court to conform to this opinion.

PART III

DEFENSES OF THE SURETY

CHAPTER IV.

PRINCIPAL NOT LIABLE ORIGINALLY.

Principal, a Married Woman.

KIMBALL v. NEWELL.

7 Hill 116 (N. Y.). 1845.

On error brought from the superior court of the city of New York, Newell brought an action of covenant against Kimball in the marine court of the city of New York, claiming to recover certain rent due on a lease to one Theodosia Knowlton, for whom the defendant had become surety. On the trial, the plaintiff gave in evidence the following instruments:

"This is to certify that I have hired and taken from Daniel Newell the house in Nassau street, etc., for one year, to commence on the first day of May, next, at the yearly rent of four hundred and fifty dollars, payable quarterly. And I do hereby promise to make punctual payment of the rent, in manner aforesaid, and quit and surrender the premises, at the expiration of the term, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. Given under my hand and seal the 3rd day of March, 1840.

"MRS. T. KNOWLTON, [L. S.]"

"In consideration of the letting of the premises above described, and for the sum of one dollar, I hereby become surety for the punctual payment of the rent, and performance of the covenants, in the above written agreement mentioned, to be paid and performed by Mrs. Theodosia Knowlton, and if any default should be made therein, I do hereby promise and agree to pay unto the said Daniel Newell such sum or sums of money as will be sufficient to make up such deficiency, and fully satisfy the conditions of the said agreement, without requiring

any notice of non-payment, or proof of demand being made. Given under my hand and seal the 3rd day of March, 1840.

"M. T. C. KIMBALL, [L. S.]"

It appeared that Mrs. Knowlton occupied under the lease, and that a balance of rent, amounting to $31.94, remained due the plaintiff. It further appeared that Mrs. Knowlton was a married woman at the time the lease was executed; and the defendant contended that, inasmuch as her covenant was void by reason of coverture, his was also void. The marine court held otherwise, however, and rendered judgment in favor of the plaintiff, which was afterward affirmed by the superior court on certiorari, and the defendant brought error.

NELSON, C. J. The defendant having consented to become bound as surety for the rent of the premises leased to Mrs. Knowlton, it is but reasonable to presume that, if he was not well acquainted with her situation before, he then made some enquiries into her circumstances and condition, and thus became fully possessed of the facts which he now sets up as a ground of discharge.

But conceding that the defendant had no knowledge of the social condition of Mrs. Knowlton, and that he supposed she would be legally holden for the rent as it accrued, I am still of the opinion that he is liable on his contract. The doctrine for which his counsel contends is thus stated by Theobald: "The obligation of the surety being accessory to the obligation of some person who is the principal debtor, it is of its essence that there should be a valid obligation of a principal debtor. The nullity of the principal obligation necessarily induces the nullity of the accessory." (Theo. Prin. & Sur. 2.) This is undoubtedly correct as a general rule; but it has its exceptions, and the case before us is one of them.

Mr. Chitty says: "The rule that a party cannot be liable upon a contract of guaranty, unless the principal has incurred a legal responsibility, is true, in some instances, in form or words, rather than in substance." (Chitty on Contr., 499.) He adds: "In the case of a guarantee to answer for the price of goods to be supplied to a married woman, or goods (not necessaries) to be sold to an infant, or other persons incom-

petent to contract, no doubt the party guaranteeing, though professedly contracting only in the character of surety, would be responsible." (Id.) He refers to the case of Maggs v. Ames (4 Bing. 470), which was an action against the defendant as surety for a married woman. There the question was whether the undertaking of the defendant was an original one, so as not to require it to be in writing. The court held that it was collateral, and therefore should have been in writing. But neither the counsel nor court supposed that the defendant would not have been bound, if the contract had been in writing. On the contrary, that was assumed. In the case of White v. Cuyler (6 T. R. 176), it was impliedly at least conceded by Lord Kenyon, that a guarantor or surety for a feme covert would be liable on his contract. (See also Chitty on Contr., 515; Pitman on Prin. and Surety, 13; Buckmyr v. Darnall (2 Ld. Raym. 1085); Harris v. Hunchback (1 Burr. 373); Chapin v. Lapham (20 Pick. 467).

The doctrine of the civil law is very clear and satisfactory on this subject. It is as follows: "Although the obligation of a surety be only an accessory to that of the principal debtor, yet he who has bound himself surety for a person who may get himself relieved from his obligation, such as a minor, or a prodigal who is interdicted, is not discharged from his suretyship by the restitution of the principal debtor; and the obligation subsists in his person; unless the restitution were grounded upon some fraud, or other vice which would have the effect to annul the right of the creditor." (Dom. B. 3, tit. 4, § 1, art. 10, Strahan's ed.) Again: If the principal obligation was annulled only because of some personal exception which the principal debtor had, as if it was a minor, who, in consideration of his being under age, got himself relieved from an engagement by which he suffered some prejudice, and that there had been no fraud on the creditor's part; the restitution of the minor would have indeed this effect, that it would annul his obligation to the creditor, and his engagement to save harmless his surety, if he desired to be relieved from it. But the said restitution of the minor would not in the least invalidate the surety's obligation to the creditor. For it was only to make good the obligation of the minor, in case he should be relieved from it on account of his

age, that the creditor took the additional security of a surety." (Id., B. 3, tit. 4, § 5, art. 2; and see 1 Ev. Poth. on Obl. 237.)

I am satisfied that the decision of the court below was right, and that the judgment should be affirmed.

BEARDSLEY, J. I think the defendant was estopped from denying the competency of Mrs. Knowlton to bind herself by the covenant she assumed to execute. The defendant by his covenant admits she was thus bound, and he shall not be allowed to gainsay it by alleging her incapacity to make a legal contract. Had she been induced to enter into this engagement by fraud or imposition, or upon a usurious consideration, the case might have been otherwise; but the defendant, although a surety, cannot be permitted, on the ground now set up, to deny the legal existence of a covenant which is explicitly conceded by his own deed. (Co. Litt. 352a, note 306; 1 Stark. Ev. 302, Am. ed. of 1830; Greenl. Ev., §§ 22 to 26, and the notes.)

The judgment of the court below is right, and should be affirmed.

Judgment affirmed.

CHAPTER VI.

PRINCIPAL'S OBLIGATION DISCHARGED OR MODIFIED BY ACT OF THE CREDITOR.

Failure to Sue the Debtor.

PAIN v. PACKARD ET AL.

13 Johns. 174 (N. Y.). 1816.

[This was an action of assumpsit on a promissory note made by Packard & Munson, in which Packard alone was arrested, the other defendant being returned not found. The defendant, Packard, pleaded: 1. Non-assumpsit. 2. That he signed the note, which was for $100, payable on demand, as surety for Munson; that he urged the plaintiff to proceed immediately in collecting the money due on the note from Munson, who was then solvent; and that, if the plaintiff had then proceeded immediately to take measures to collect the money of Munson, he might have obtained payment from him; but the plaintiff neglected to proceed against Munson until he became insolvent, absconded and went away out of the state, whereby the plaintiff was unable to collect the money of Munson. 3. The third plea was like the second, except that the defendant alleged a promise, on the part of the plaintiff, that he would immediately proceed to collect the money of Munson, and a breach of that promise, by which the defendant was deceived and defrauded, and prevented from obtaining the money from Munson, etc.

There was a demurrer to the second and third pleas and a joinder in demurrer, which was submitted to the court without argument.]

PER CURIAM. The facts set forth in the plea are admitted by the demurrer. The principles laid down in the case of The People v. Jansen (7 Johns. 336) will warrant and support this plea. We there say a mere delay in calling on the principal will not discharge the surety. The same principle was

fully and explicitly laid down by the court in the case of Tallmadge v. Brush. But this is not such a case. Here is a special request, by the surety, to proceed to collect the money from the principal; and an averment of a loss of the money as against the principal, in consequence of such neglect. The averments and facts stated in the plea are not repugnant, or contradictory to the terms of the note. The suit here is by the payee against the makers. The fact of Packard having been security only is fairly to be presumed to have been known to the plaintiff. He was, in law and equity, therefore bound to use due diligence against the principal in order to exonerate the surety. This he has not done. There can be no substantial objections against such a plea. It may be said, the surety might have paid the note and prosecuted the principal; but although he might have done so, he was not bound to do it. If he had a right to expedite the plaintiff in proceedings against the principal and choose to rest on that, he might do so. In the case of Trent Nav. Co. v. Harley (10 East. 34) the plea was similar to the present and not demurred to.

The defendant must, accordingly, have judgment upon the demurrer.

Judgment for the defendant.

Failure to Notify the Guarantor of Acceptance.

DAVIS ET AL., PLFFS. IN ERR., v. WELLS, FARGO & COMPANY.

104 U. S. 159, L. Ed., Book 26, 686. 1881.

In error to the Supreme Court of the Territory of Utah.

MATTHEWS, J., delivered the opinion of the court:

The action below was brought by Wells, Fargo & Co., against the plaintiffs in error, upon a guaranty, in the following words:

"For and in consideration of one dollar to us in hand paid by Wells, Fargo & Co. (the receipt of which is hereby acknowledged), we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times, any indebtedness of Gor-

don & Co., a firm now doing business at Salt Lake City, Territory of Utah, to the extent of and not exceeding the sum of ten thousand dollars ($10,000) for any overdrafts now made, or that may hereafter be made, at the bank of said Wells, Fargo & Co.

"This guaranty to be an open one, and to continue one at all times to the amount of ten thousand dollars, until revoked by us in writing.

"Dated Salt Lake City, 11th November, 1874.

"In witness whereof we have hereunto set our hands and seals the day and year above written.

"ERWIN DAVIS. [seal]

"J. N. H. PATRICK. [seal]

"Witness: J. GORDON."

The answer set up, by way of defense, that there was no notice to the defendants from the plaintiffs of their acceptance of the guaranty, and their intention to act under it; and no notice, after the account was closed, of the amount due thereon; and no notice of the demand for payment upon Gordon & Co., and of their failure to pay within a reasonable time thereafter.

But there was no allegation that by reason thereof any loss or damage had accrued to the defendants.

On the trial it was in evidence that this guaranty was executed by the defendants below and delivered to Gordon on the day of its date, for delivery by him to Wells, Fargo & Co., which took place on the same day; that Gordon & Co. were then indebted to the plaintiffs below for a balance of over $9,000 on their bank account; that their account continued to be overdrawn, Wells, Fargo & Co. permitting it on the faith of the guaranty, from that time till July 31, 1875, when it was closed, with a debit balance of $6,200; that the account was stated and payment demanded at that time of Gordon & Co., who failed to make payment; that a formal notice of the amount due and demand of payment was made by Wells, Fargo & Co., of the defendants below, on May 26, 1876, the day before the action was brought. There was no evidence of any other notice having been given in reference to it; either that Wells, Fargo & Co. accepted it and intended to rely upon it, or of the amount of the balance due at or after the account was closed; and no evidence was offered of any

loss or damage to the defendants by reason therefore, or in consequence of the delay in giving the final notice of Gordon & Co.'s default.

The defendants' counsel requested the court, among others not necessary to refer to, to give to the jury the following instructions, numbered first, second, third and fifth:

1. If the jury believes from the evidence that the guaranty sued upon was delivered by the defendants to Joseph Gordon, and not to the plaintiff, but was afterwards delivered to the latter by Joseph Gordon, or by Gordon & Co., it became and was the duty of Wells, Fargo & Co. thereupon to notify the defendants of the acceptance of said guaranty, and their intention to make advancements on the faith of it, and, if they neglected or failed so to do, the defendants are not liable on the guaranty, and your verdict must be for the defendants.

2. If Wells, Fargo & Co. made any advancements to Gordon & Co. on overdrafts on the faith of said guaranty, it became and was the duty of plaintiff to notify the defendants, within a reasonable time after the last of said advancements, of the amount advanced under the guaranty, and if the plaintiff failed or neglected so to do, it cannot recover under the guaranty, and your verdict must be for the defendants.

3. What is a reasonable time in which notice should be given is a question of law for the court. Whether notice was given is one of fact for the jury. The court, therefore, instructs you that if notice of the advancements made under said guaranty was not given until after the lapse of twelve months or upward from the time the last advancement was made to Gordon & Co., this was not, in contemplation of law, a reasonable notice, and your verdict, if you so find the fact to be, should be for the defendants.

5. Before any right of action accrued in favor of plaintiff under said guaranty, it was incumbent on it to demand payment of the principal debtor, Gordon & Co., and, on their refusal to pay, to notify the defendants. If the jury, therefore, find that no such demand was made, and no notice given to the defendants, the plaintiff cannot recover upon the guaranty.

The court refused to give each of these instructions, and the defendants excepted.

The following instructions were given by the court to the jury, to the giving of each of which the defendants excepted:

1. You are instructed that the written guaranty offered in evidence in this case is an unconditional guaranty by defendants, of any and all overdrafts, not exceeding in amount $10,000, for which said Gordon & Co. were indebted to the plaintiff at the date of the commencement of this suit. If the jury believe from the evidence that said guaranty was by said defendants, or by any one authorized by them to deliver the same, actually delivered to plaintiff, and that plaintiff accepted and acted on the same, such delivery, acceptance and action thereon by plaintiff bind the defendants, and render the defendants responsible in the action for all overdrafts upon plaintiff made by Gordon & Co., at the date of and since the date of said delivery of said guaranty, and which were unpaid at the date of the commencement of this suit, not exceeding $10,000.

2. The jury are instructed that the written document under seal, offered in evidence in this case, implies a consideration, and constitutes an unconditional guaranty of whatever overdraft, if any, not exceeding $10,000, which the jury may find from the evidence that Gordon & Co. actually owed the plaintiff at the date of the bringing of this suit; and further, if you believe from the evidence that an account was stated of such overdraft between plaintiff and J. Gordon & Co., then the plaintiff is entitled to interest on the amount found due at such statement, from the date thereof, at the rate of ten per cent per annum.

These exceptions form the basis of the assignment of errors.

The charge of the court first assigned for error, and its refusal to charge upon the point as requested by the plaintiffs in error, raises the question whether the guaranty becomes operative if the guarantor be not within a reasonable time informed by the guarantee of his acceptance of it and intention to act under it.

It is claimed in argument that this has been settled in the negative by a series of well considered judgments of this court.

It becomes necessary to inquire precisely what has been thus settled, and what rule of decision is applicable to the facts of the present case.

In Adams v. Jones, 12 Pet. 213, Mr. Justice Story, delivering the opinion of the court, said: "And the question which, under this view, is presented, is whether, upon a letter of guaranty, addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it; we are all of the opinion that it is necessary and this is not now an open question in this court, after the decisions which have been made in Russell v. Clark, 7 Cranch 69; Edmonston v. Drake, 5 Pet. 624; Douglass v. Reynolds, 7 Pet. 113; Lee v. Dick, 10 Pet. 482; and again recognized at the present term in the case of Reynolds v. Douglass, 12 Pet. 497.

"It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability, to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him, and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from further responsibility. The reason applies with still greater force to cases of a general letter of guaranty, for it might otherwise be impracticable for the guarantor to know to whom and under what circumstances the guaranty attached, and to what period it might be protracted. Transactions between the other parties to a great extent might from time to time exist, in which credits might be given and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the questions were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own."

In Reynolds v. Douglass, 12 Pet. 504, decided at the same term and referred to in the foregoing extract, Mr. Justice McLean stated the rule to be "That, to entitle the plaintiffs to recover on said letter of credit, they must prove that notice had been given in a reasonable time after said letter of credit had been accepted by them, to the defendants, that the same had been accepted"; and added, "This notice need not be proved.

to have been given in writing or in any particular form, but may be inferred by the jury from facts and circumstances which shall warrant such inference."

There seems to be some confusion as to the reason and foundation of the rule, and, consequently, some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise; in others it has been considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it as a condition of the promise of the guarantor.

The former is the sense in which the rule is to be understood as having been applied in the decisions of this court. This appears very plainly, not only from a particular consideration of the cases themselves, but was formally declared to be so by Mr. Justice Nelson, speaking for the court in delivering its opinion in the case of Manufacturing Co. v. Welch, 10 How. 475, where he uses this language:

"He (the guarantor) has already had notice of the acceptance of the guaranty and of the intention of the party to act under it. The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this court, according to all the cases; *it is deemed essential to an inception of the contract;* he is, therefore, advised of his accruing liabilities upon the guaranty, and may very well anticipate or be charged with notice of an amount of indebtedness to the extent of the credit pledged."

And in Wildes v. Savage, 1 Story 22, Mr. Justice Story, who had delivered the opinion in the case of Douglass v. Reynolds, 7 Pet. 113, after stating the rule requiring notice by the guarantee of his acceptance, said: "This doctrine, however, is inapplicable to the circumstances of the present case; for the agreement to accept was contemporaneous with the guaranty, and, indeed, constituted the consideration and basis thereof."

The agreement to accept is a transaction between the guarantee and guarantor, and completes that mutual assent necessary to a valid contract between them. It was, in the case cited, the consideration for the promise of the guarantor. And wherever a sufficient consideration of any description passes directly between them, it operates in the same manner and with like effect. It establishes a privity between them and creates an obligation. The rule in question proceeds upon the ground that the case in which it applies is an offer or proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete and may be withdrawn by the proposer. Frequently the only consideration contemplated is, that the guarantee shall extend the credit and make the advances to the third person, for whose performance of his obligation, on that account, the guarantor undertakes. But a guaranty may as well be for an existing debt, or it may be supported by some consideration distinct from the advance to the principal debtor, passing directly from the guarantee to the guarantor. In the case of the guaranty of an existing debt, such a consideration is necessary to support the undertaking as a binding obligation. In both these cases, no notice of assent, other than the performance of the consideration, is necessary to perfect the agreement; for, as Prof. Langdell has pointed out in his Summary of the Law of Contracts (Langdell Cas. on Cont., 987), "Though the acceptance of an offer and the performance of the consideration are different things, and though the former does not imply the latter, yet the latter does necessarily imply the former; and as the want of either is fatal to the promise, the question whether an offer has been accepted can never, in strictness, become material in those cases in which a consideration is necessary; and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration."

If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows, as declared in Wilds v.

Savage, supra, where the agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis. It must be so wherever there is a valuable consideration, other than the expected advances to be made to the principal debtor, which passes at the time the undertaking is given from the guarantee to the guarantor, and equally so where the instrument is in the form of a bilateral contract, in which the guarantee binds himself to make the contemplated advances, or which otherwise creates, by its recitals, a privity between the guarantee and the guarantor. For in each of these cases the mutual assent of the parties to the obligation is either expressed or necessarily implied.

The view we have taken of the rule under consideration, as requiring notice of acceptance and of the intention to act under the guaranty, only when the legal effect of the instrument is that of an offer or proposal, and for the purpose of completing its obligation as a contract, is the one urged upon us by the learned counsel for the plaintiff in error, who says, in his printed brief: "For the ground of the doctrine is not that the operation of the writing is conditional upon notice, but it is, that until it is accepted and notice of its acceptance given to the guarantor, there is no contract between the guarantor and the guarantee; the reason being that the writing is merely an offer to guaranty the debt of another, and it must be accepted and notice thereof given to the party offering himself as security before the minds meet and he becomes bound. Until the notice is given, there is a want of mutuality; the case is not that of an obligation on condition, but of an offer to become bound not accepted; that is, there is not a conditional contract, but no contract whatever."

It is thence argued that the words in the instrument which is the foundation of the present action—"we hereby guarantee unto them, the said Wells, Fargo & Co., *unconditionally, at all times,* etc."—cannot have the effect of waiving the notice of acceptance, because they can have no effect at all except as the words of a contract, and there can be no contract without notice of acceptance. And on the supposition that the terms of the instrument constitute a mere offer to guaranty the debts of Gordon & Co., we accept the conclusion as entirely just.

But we are unable to agree to that supposition. We think that the instrument sued on is not a mere unaccepted proposal. It carries on its face conclusive evidence that it has been accepted by Wells, Fargo & Co., and that it was understood and intended to be, on delivery to them, as it took place, a complete and perfect obligation of guaranty. That evidence we find in the words—"for and in consideration of one dollar, to us paid by Wells, Fargo & Co., the receipt of which is hereby acknowledged, we hereby guarantee," etc. How can that recital be true, unless the covenant of guaranty had been made with the assent of Wells, Fargo & Co., communicated to the guarantors? Wells, Fargo & Co. had not only assented to it, but had paid value for it, and that into the very hands of the guarantors, as they by the instrument itself acknowledge.

It is not material that the expressed consideration is nominal. That point was made, as to a guarantee, substantially the same as this, in the case of Lawrence v. McCalmont, 2 How. 452, and was overruled. Mr. Justice Story said:

"The guarantor acknowledged the receipt of the one dollar and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guarantee as to other contracts. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid. The very point arose in Dutchman v. Tooth, 5 Bing. (N. C.) 577, where the guarantor gave a guaranty for the payment of the proceeds of the goods the guarantee had consigned to his brother, and also all future shipments the guarantee might make in consideration of two shillings and sixpence, paid him, the guarantor. And the court held the guaranty good, and the consideration sufficient."

It is worthy of note that in the case from which this extract is taken the guaranty was substantially the same as that in the present case, and that no question was made as to a notice of acceptance. It seems to have been treated as a complete contract by force of its terms.

It does not affect the conclusion, based on these views, that the present guaranty was for future advances as well as an existing debt. It cannot, therefore, be treated as if it were an engagement, in which the only consideration was the future credit solicited and expected. The recital of the consideration paid by the guarantee to the guarantor shows a completed contract, based upon a mutual assent of the parties; and if it is a contract at all, it is one for all the purposes expressed in it. It is an entirety and cannot be separated into distinct parts. The covenant is single and cannot be subjected in its interpretation to the operation of two diverse rules.

Of course the instrument takes effect only upon delivery. But in this case no question was or could be made upon that. It was admitted that it was delivered to Gordon for delivery to the plaintiffs below, and that Gordon delivered it to them.

But if we should consider that, notwithstanding the completeness of the contract as such, the guaranty of future advances was subject to a condition implied by law that notice should be given to the guarantor that the guarantee either would or had acted upon the faith of it, we are led to inquire, what effect is to be given to the use of the words which declare that the guarantors thereby "Guarantee unto them, the said Wells, Fargo & Co., *unconditionally, at all times,* any indebtedness of Gordon & Co., etc., to the extent and not exceeding the sum of $10,000, for any overdrafts now made, or that hereafter may be made, at the bank of said Wells, Fargo & Co."

Upon the supposition now made, the notice alleged to be necessary arises from the nature of such a guaranty. It is not, and cannot be claimed that such a condition is so essential to the obligation that it cannot be waived. We do not see, therefore, what less effect can be ascribed to the words quoted than that all conditions that otherwise would qualify the obligation are by agreement expunged from it and made void. The obligation becomes thereby absolute and unqualified; free from all conditions whatever. This is the natural, obvious and ordinary meaning of the terms employed, and we can not doubt that they express the real meaning of the parties. It was their manifest intention to make it unambiguous that Wells, Fargo & Co., for any indebtedness that might arise to them in consequence of overdrafts by Gordon & Co., might

securely look to the guarantors without the performance on their part of any conditions precedent thereto whatever.

It has always been held in this court that, notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit and liberally to promote the use and convenience of commercial intercourse.

This view applies with equal force to the exceptions to the other charges and refusals to charge of the court below. These exceptions are based on the propositions:

1. That if Wells, Fargo & Co. neglected to notify the defendants below of the amount of the overdraft within a reasonable time after closing the account of Gordon & Co.; and

2. That if they failed within a reasonable time after demand of payment made upon Gordon & Co., to notify the defendants of the default, the plaintiffs could not recover upon the guaranty.

For, if the necessity in either or both of these contingencies existed, to give the notice specified, it was because the duty to do so was, by construction of law, made conditions of the contract.

By its terms, as we have shown, the contract was made absolute, and all conditions waived.

It is undoubtedly true, that if the guarantee fails to give reasonable notice to the guarantor of the default of the principal debtor, and loss or damage thereby ensues to the guarantor, to that extent the latter is discharged; but both the laches of the plaintiff and the loss of the defendant must concur to constitute a defense.

If any intermediate notice, at the expiration of the credit, of the extent of the liability incurred is requisite, the same rule applies. Such was the expressed decision of this court in the case of Manufacturing Co. v. Welch, supra. An unreasonable delay in giving notice, or a failure to give it altogether, is not a bar, of itself.

There was a question made at the trial, as to the meaning of the word "overdrafts," as used in the guaranty; and it was contended that it would not include the debit balance of accounts charged to Gordon & Murray, and assumed by Gor-

don & Co., as their successors, before the guaranty was made, nor charges of interest accrued upon the balances of Gordon & Co.'s account, which were entered to the debit of the account. The reason alleged was, that no formal checks were given for these amounts. The point was not urged in argument at the bar, and was very properly abandoned. The charges were legitimate and correct, and the balance of the account to the debit of Gordon & Co. was the overdraft for which they were liable. There could be no doubt that it was embraced in the guaranty.

We find no error in the record, and the judgment is affirmed.

Alteration of the Principal's Contract or Variation of the Surety's Risk.

CAMBRIDGE SAVINGS BANK v. HYDE AND ANOTHER.

131 Mass. 77. 1881.

MORTON, J. This is a suit against the executors of one of the sureties upon a promissory note held by the plaintiff. By the note, which is dated October 16, 1871, the maker promises to pay to the plaintiff $6,000 on demand, with interest at the rate of seven and one-half per cent per annum, payable semi-annually. At the trial it appeared that the treasurer of the plaintiff, some years after the date of the note, having authority to do so, wrote upon the back of the note the memorandum, "Rate of interest to be 6½ per cent from Oct. 10, 1876." The defendants asked the court to rule "that any change in the rate of interest of the note, whether made on the face of the note or by a memorandum in the margin or upon the back of the note, was a change in the terms of the contract, and a material alteration of the note such as would discharge the defendant's testator, if made without his consent, and that the indorsement upon the back of the note in suit was such an alteration"; which ruling the court refused.

The defendants contend, in the first place, that this memorandum thus made was a material alteration, in the sense of a mutilation, of the note, which avoided it as to all parties not consenting to it. In the cases where it has been held that

a material alteration of a note or other contract avoids it, there has been some change by erasure or interlineation in the paper writing constituting the evidence of the contract, so as to make it another and different instrument, and no longer evidence of the contract which the parties made. The ground of the decisions is that the identity of the contract is destroyed. Wade v. Withington; Commonwealth v. Emigrant Savings Bank; Belknap v. National Bank of North America; Hewins v. Cargill. But in the case at bar it is clear that, using the word in this sense, there has been no alteration of the note. The original note remains intact. It is in no respect altered or made different. The memorandum on the back is evidence of an independent collateral agreement, and has no more effect than if it had been written on a separate paper.

The defendants also contend that, if the memorandum is to be treated as an independent collateral agreement, yet it makes such a change in the terms of the contract as to discharge the sureties, who did not consent to it. It is clear that, if a creditor makes any agreement with the principal debtor, or does any other act which is prejudicial to the rights of the surety, the surety is discharged from his liability. Thus, if the creditor, by a valid agreement founded upon a sufficient consideration, extends the time of payment of the debt, the surety is discharged. The reason is, that such an agreement materially affects the rights of the surety, since it prevents him from paying the debt and having an immediate remedy against the principal debtor. Hunt v. Bridgham; Agricultural Bank v. Bishop. Mr. Justice Story states the rule to be, "that if a creditor does any act injurious to the surety, or inconsistent with his rights; or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety; in all such cases the latter will be discharged." 1 Story Eq. Jur., § 325. The surety is discharged because the act of the creditor is injurious to him and is inconsistent with the duty which the creditor owes to him. Where the act of which the surety complains is a new agreement changing some of the terms of the original agreement, we think the true rule is, that, if such new agreement is or may be injurious to the surety, or if it amounts to a substitution of the new agreement for the old, so as to discharge

and put an end to the latter, the surety is discharged. But if the change in the original contract from its nature is beneficial to the surety, or if it is self-evident that it cannot prejudice him, the surety is not discharged. Smith v. United States; Appleton v. Parker; General Steam Navigation Co. v. Rolt; Bowmaker v. Moore; Holme v. Brunskill.

In the case at bar, the new agreement was, that, after a day named, the interest on the principal sum lent by the plaintiff should be at the rate of six and a half instead of seven and a half per cent. It was clearly not the intention of the parties to discharge the note and substitute a new contract in its place. The agreement presupposes that the note is to remain in force as a promise to pay the principal debt. The parties did not intend to release the principal debtor or the sureties from their obligation to pay the note, but only to remit a portion of the interest payable under it for the use of the money. We know of no rule of law which requires us to defeat the intention of the parties by holding that this operated to discharge the original contract in whole. It is also clear that the change in the original contract, by reducing the rate of interest, could not be prejudicial to the sureties. It is to be borne in mind that there was no contract by the plaintiff giving time to the principal debtor, and no contract by the debtor that the amount of the note should remain on interest at the new rate for any time. The plaintiff could at any time have sued on the note, and the sureties could at any time have paid the note and have had a right to sue their principal at once. The agreement was merely a stipulation to remit a part of the sum which the plaintiff might claim under the note. It did not tie the hands of the creditor, or alter unfavorably the condition of the surety. If there was any consideration for it, so that it had any validity, it could not operate to the injury of the sureties, any more than an indorsement of, or a receipt for, a part of the principal would. The change made in the terms of the note was necessarily beneficial to all parties bound by it. We are of opinion that the sureties were not discharged, even if they had no knowledge of the change; and that the ruling of the Superior Court to that effect was correct.

Judgment on the verdict for the plaintiff.

CALVERT, EXECUTOR, v. THE LONDON DOCK CO.

2 Keen 638 (Eng. Chan.). 1838.

The following were the circumstances of the case: By contract, in writing, dated the 29th day of September, 1829, Robert Streather, a builder, agreed with James Warre, the treasurer of the London Dock Company, on behalf of the company, to perform certain works, which were to be commenced twenty days after notice, and to be completed in twelve months from the commencement. Streather was to provide all materials and labor, in consideration of £52,200, and being allowed to appropriate certain materials mentioned.

The engineer of the company was to be the sole judge of the works, and was to employ competent persons to perform the works, if Streather failed to do so; and in that case, the costs thereof were to be deducted from the sum to become due to Streather under the contract. A provision was made for varying the price, on any variation being made in the work specified in the contract; and Mr. Warre, for the company, agreed to pay the £52,200 by installments,—viz., three-fourths of the cost of the work certified to be done every two months, and the remaining one-fourth after the full completion of the contract.

On the 3d of November, 1829, Streather, and Warburton and Laycock, as his sureties, executed to James Warre, as treasurer of the company, their joint and several bond for the sum of £5,000, conditioned to be void if Streather should well and truly observe, perform and keep the promises and agreements contained in the contract, which, on the part of Streather, were and ought to be performed, according to the true intent and meaning of the contract.

Notice having been given, Streather commenced the works on the 28th of December, 1829, but did not complete them in twelve months, or before the 28th of March, 1831, to which day the time for completing the works was enlarged, with the consent of Warburton and Laycock.

The time having expired, the London Dock Company gave notice to the sureties that they would be called upon to pay the £5,000, under the bond.

On the 13th of April, 1831, Streather quitted the works, and soon afterwards became bankrupt.

* * * * * * *

The company alleged that they had sustained damage to the amount of more than £7,000, by the default of Streather; and in January, 1835, they caused actions to be brought against the sureties, to recover the full penalty of the bond; and in the particulars of their demand they stated that they had made payments on account of the contract, to the amount of £49,619 5s, and in completing the works £18,875 3s 2d, making together £68,494 8s 2d: that there had become due to Streather, on the contract, £52,200; for varied and increased work, £3,721 16s 8d; and for the implements, engines and materials he had left, £4,857 3s 9d—making, in all, £60,779 0s 5d; and they represented the differences as the amount of their loss sustained by the nonperformance of the works by Streather.

Under these circumstances the plaintiffs filed their bill; and after alleging that the referee in the action against the company had stated, that although the payments made to Streather amounted to £49,619, the value of the work done by Streather was only £36,429, they charged, that in executing the bond, the sureties considered, and had a right to consider, that the company, until the entire performance of the contract, would have retained in their hands so much of the contract price as by the contract they were entitled to retain, as a security for the performance of the rest of the contract; and that by advancing to Streather more than they were bound to do, the company deprived the plaintiffs of the benefit of that security, and thereby, in equity, released them from the bond; or, at least, could not equitably recover against the plaintiffs any loss which they might have sustained by making such advances; and ought not to be permitted to sue the plaintiffs on the bond, for if they had not made such advances, they would not have sustained any loss by the nonperformance of the contract.

The common injunction, for want of answer, was obtained.

The actions were tried on the 20th of February, 1836. The plaintiffs there obtained a verdict, with only nominal damages.

It is now asked that the common injunction which has been

granted might be made perpetual, and that the defendants might pay the costs of suit.

Mr. Tinney, Mr. Kindersley and Mr. Roupell, for the plaintiffs.

Mr. Pemberton, Mr. Phillimore, and Mr. Blunt, for the defendants, insisted that nothing had been done in this case to release the sureties; that the company had made the extra advances to the contractor, not under the contract, but as loans, which they were entitled to do, and had thereby greatly facilitated the performance of the work. That so far from prejudicing the sureties, the company had diminished their liability; for, but for these timely advances, the contract would long before have been abandoned, and the bond forfeited.

On the point of costs they said that the plaintiff's remedy was at law; and it was no justification for the prosecution of this suit, and no reason for the interference of this court, because nominal damages only were recoverable at law. That the costs of the action had been provided for at law, and no costs ought to be given in this suit; for the point in litigation between the parties having been already decided by the Court of King's Bench, there was no ground for now making any decree.

The MASTER OF THE ROLLS (after stating the case) proceeded:

The defendants do not dispute the fact that their advances to Streather exceeded the sums which they were bound to advance under the contract, but they say that the increased advances were made for the purpose of giving Streather greater facility to perform the contract. It is said that the performance of the work by Streather was impeded by his want of funds; and that by the advances made to him he was enabled to do more than he otherwise could have done, and that to assist him was to assist his sureties; and it was only for the purposes of affording that assistance that the company did more than they were obliged to do.

The argument, however, that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of time being

given to the principal debtor, or of a compromise being made with him, it has been contended, that what was done was beneficial to the surety,—and the answer has always been, that the surety himself was the proper judge of that,—and that no arrangement, different from that contained in his contract, is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is, whether what has been done lessens that security.

In this case, the company were to pay for three-fourths of work done every two months; the remaining one-fourth was to remain unpaid for till the whole was completed; and the effect of this stipulation was, at the same time, to urge Streather to perform the work, and to leave in the hands of the company a fund wherewith to complete the work if he did not; and thus it materially tended to protect the sureties.

What the company did was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure which, by the contract, was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands one-fourth of the value of the work done, became creditors to a large amount, without any security; and under the circumstances I think that their situation with respect to Streather was so far altered that the sureties must be considered to be discharged from their suretyship.

I think, therefore, that the plaintiffs are entitled to have the injunction made perpetual, and that they are also entitled to the costs of this suit.

The plaintiffs appear not to have had a complete legal defence, though they had a case which reduced the damages to a nominal amount. They could not, however, anticipate the result of the action. They had an equitable defence; and, under the circumstances of this case, if an application had been made for the purpose, I do not think that the plaintiff in equity would have been ordered to give judgment; and, after the verdict with nominal damages, the application to the Court of King's Bench made by the plaintiffs at law

made it important for the defendants there to proceed with their bill in equity.

WATTS v. SHUTTLEWORTH.

5 Hurlst. & Norm. 235, 7 Hurlst. & Norm. 355 (Eng.). 1860-1861.

The judgment of the court was now delivered by

POLLOCK, C. B. This is a rule obtained by the defendant to enter a verdict upon the issue joined on the sixth plea. The action is on a guaranty, and the breach alleged is that one Harrap had not completed certain fittings in accordance with an agreement entered into by him with the plaintiff. The sixth plea is an equitable one; and the questions which have been argued before us are, first, whether there is a defence to the action; and, secondly, whether the sixth plea was proved, that is, whether upon the evidence the verdict on the issue raised by the sixth plea ought to be entered for the defendant. The facts proved or admitted are as follows: By articles of agreement, dated the 6th of February, 1857, made between the plaintiff and Harrap, the latter agreed, in consideration of £3,450, to execute the fittings of the first and second floors of a warehouse in Manchester, and complete the same on or before the 29th of September, 1857, according to the drawings and specifications prepared by Messrs. Travis and Mangnall, architects. After a variety of stipulations relative to the contract, there was one as follows: "That the said Samuel Watts (the plaintiff) shall and may insure the fittings from risk or accident by fire at such time and to such amount as the architects aforesaid may consider necessary, and deduct the cost of such insurance for the time during which the works are unfinished from the amount of the contract." Also, "that the said G. Harrap should and would provide to the satisfaction of the architects a good, dry, well heated, and sufficient store, for the express purpose and no other, of the reception of the fittings from time to time as each and every of them are completed and until they can be received at the said warehouse." The agreement afterwards provided that the plaintiff should pay Harrap £1,800 during the making of the fittings,

between the date of the agreement and the 15th of August then next. On the 9th of February the defendant signed the guaranty. It recited in part the contract between the plaintiff and Harrap; and the defendant bound himself to guarantee to the plaintiff the due performance of the contract in accordance in all respects with the said agreement, conditions, drawings and specifications, and such further drawings as might from time to time be provided by the architects, in a good, substantial and workmanlike manner, and to the satisfaction of the architects, in the sum of £4,000; and that if Harrap should neglect or omit to complete the said fittings in accordance with the said agreement, conditions, drawings, and specifications to the satisfaction of the plaintiff and his architects, then the plaintiff should be at liberty to recover the said sum of £3,450, or such portion thereof as might be required to complete the work contracted for. We have stated the guaranty at some length, because it was contended on behalf of the plaintiff that it extended to a guaranty that Harrap should provide a store for the reception of the fittings until they were taken to the warehouse. It seems to us that this is not so, and that the guaranty merely extended to the doing and completing the work. The defendant was examined at the trial, and stated that he went to the office of the architects to execute the guaranty; that a clerk there read to him the articles of agreement between the plaintiff and Harrap, and stated to him that he incurred no risk in consequence of the stipulation as to the insurance; and that, thereupon, he signed the guaranty. The further facts were: that the plaintiff advanced to Harrap £1,800; that a number of fittings to the value of £2,300 were made and placed in a room in Harrap's workshop, where they were destroyed by an accidental fire; that the fittings were never put up, Harrap having become insolvent; that the plaintiff had not been repaid the £1,800, and had been obliged to pay £340 beyond the sum of £3,450 to another builder to do the work. It was admitted that the fittings destroyed were of the value before stated, and had not been insured by the plaintiff. A verdict was entered for the plaintiff for £2,140, and leave was given to the defendant to move to enter it for him upon the sixth plea; and also that he should be at liberty to amend the plea.

The substantial question in the case is, whether the omission

to insure discharges the defendant, the surety. The rule upon the subject seems to be that if the person guaranteed does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged. Story's Equity Jurisprudence, § 325. The same principle is enunciated and exemplified by the Master of the Rolls in Pearl v. Deacon, where he cited with approbation the opinion of Lord Eldon, in Craythorne v. Swinburne, that the rights of a surety depend rather on principles of equity than upon the actual contract; that there may be a *quasi* contract; but that the right of the surety arises out of the equitable relation of the parties. The Master of the Rolls also referred to the judgment of Vice-Chancellor Wood in Newton v. Chorlton, where he laid down that a creditor is bound to give the surety the benefit of every security he holds at the time of the contract; that the surety has a complete right to the benefit of it, and if the benefit be lost he would be discharged. It was argued on behalf of the plaintiff, that until the fittings were put into a store provided for the express purpose of their reception, the obligation of the plaintiff to insure did not attach. We think that is not so. In our opinion the contract to insure was an independent one; it precedes the contract as to the store in the agreement, and it is in no way made to depend upon it. Indeed, there is evidence that the fittings were in a place satisfactory to the architects; and, as between the plaintiff and the defendant, the surety, we think that the plaintiff ought to have been active to see that a proper store had been provided. The architects were his agents. It was also argued that the stipulation to insure was not obligatory. But we cannot adopt this view. We think the plaintiff ought to have insured. It therefore seems to us that the plaintiff has omitted to do an act which his duty towards the defendant required him to do; that if he had done it the defendant would have been relieved to the extent of the insurance; that the omission therefore was injurious to him, and that he has been thereby discharged from the suretyship.

No distinction was taken in the argument between the £1,800 and the £340 paid to the new contractor. It was also argued that the statement of the architects' clerk to the defendant before the signing of the guaranty was not admissible in evidence. We rather think it was; but whether or not is quite immaterial. The

articles of agreement were read to the defendant. This evidence was clearly properly receivable, and was quite sufficient evidence of the averment in the plea to which the statement of the clerk is applicable. Indeed the whole of this evidence becomes immaterial because, according to the cases of Pearl v. Deacon and Newton v. Chorlton, the right of the surety exists whether he knew of the stipulation to insure or not.

The remaining question is merely whether the sixth plea is proved. It has been slightly amended in pursuance of the leave reserved. We are of opinion that the evidence given at the trial is sufficient to entitle the defendant to have the verdict entered for him on the issue on the sixth plea, as amended. The rule will therefore be absolute to enter the verdict for the defendant upon the sixth plea.

Rule absolute.

The judgment of the Court of Exchequer Chamber was now delivered by

WILLIAMS, J. In this case the court, at the close of the argument, was unanimous in thinking that the defendant, as surety, was discharged by the plaintiff's omission to insure. But some doubts were felt whether the discharge ought to be regarded as total, or only to the extent of the damages which could be shown to have been sustained by the surety in respect of that omission. In support of the latter view, it was contended, on behalf of the plaintiff, that the present case is analogous to that of a creditor who has lost or given up to his debtor a security which he has in his hands, where the surety is held to be thereby discharged, because of the rule that a surety is entitled to the benefit of all the securities which the creditor has against the principal; not however *in toto*, but only to the extent of the security so lost or given up.

But on consideration we are all of opinion that, in the present instance, the discharge of the surety, being effected by reason of his position having been deteriorated in respect of having been made responsible for an uninsured principal, in lieu of an insured one, the case is analogous to those where a surety has been held discharged by time having been given to the debtor, as in Samuel v. Howarth, and other cases, such as Eyre v. Bartrop, Calvert v. The London Dock Company, and The General Steam Navigation

Company v. Rolt, where the creditor had so conducted himself as to alter the situation of surety, and the surety was held to be thereby totally discharged. We are therefore of opinion that the judgment of the Court of Exchequer must be affirmed.

Judgment affirmed.

Dealings of the Creditor and Co-surety.

DODD v. WINN.

27 Mo. 501. 1858.

This was an action in favor of Levi Dodd against Isham O. Winn on a promissory note executed by David C. Glascock, M. McDonald, R. F. Richmond, Minor J. Winn, James G. Caldwell and said Isham O. Winn. The jury found the following special verdict: "We, the jury, find a special verdict as follows: On the 6th day of April, 1849, the plaintiff Dodd sued Minor J. Winn, on the same note now sued on, before the recorder of the city of Hannibal, the said Minor being one of the obligors in the note. Said Dodd recovered a judgment before said recorder against said Minor on the 6th day of April, 1850; and an execution was issued by said recorder on said judgment on the 11th day of April, 1850, and placed in the hands of the marshal of said city, and by him levied on a house in said city as the property of Minor J. Winn; that said marshal advertised said house for sale under said execution, but did not sell the house, being ordered by the plaintiff's counsel to tear down the advertisements and return the execution 'no property found;' which he did; and no execution has since issued on said judgment by the recorder. The jury further find as follows, that when the marshal levied on the house as aforesaid, a part of said house was owned by said Minor J. Winn, which part so owned by him was worth the sum of $137.50. Said house was standing on a piece of ground owned by Jeremiah Strode, who had leased it to said Minor J. Winn, with the privilege of taking off when he pleased any house he might erect thereon. Minor J. Winn had built the house in question on said lot, but had sold a part of it before the execution was levied as before stated. The jury further find that David C. Glascock was the principal in the note sued on,

and that Minor J. Winn and Isham O. Winn were each securities for said Glascock."

The court rendered judgment on this verdict in favor of plaintiff for eighty dollars debt (four-fifths of the amount of the original note sued on), and assessed the damages for the detention thereof at seventy-six dollars.

RICHARDSON, J., delivered the opinion of the court.

The law is well settled that a valid agreement between the creditor and the principal debtor to extend the time of payment, or any improper interference by the creditor with the process of law after the commencement of a suit, by which the surety may be injured or subjected to greater risk, or be delayed in the right on payment of the debt to proceed against the principal, if made or done without the assent of the surety, will discharge him from his liability (24 Mo. 333; 26 Mo. 243); and the relation of principal and surety or of co-sureties is not extinguished by judgment. Rice v. Morton, 19 Mo. 263. A release of the principal will discharge the surety, but one surety may be discharged, without prejudice to an action against the others, to the extent that they would be liable in a suit for contribution between themselves. Routon v. Lacy, 17 Mo. 399. The creditor can not, by discharging one, increase the liability of the other; and he will not be allowed, by discharging one, to impose on the other a greater proportion of a common burden than in equity he ought to bear. At law, if there are several sureties and one is insolvent and another pays the whole debt, he can only recover against the solvent sureties their *pro rata* part as if all of them were solvent; but the rule in equity is more just and reasonable, and the insolvent's share is apportioned among those who are solvent. 1 Story Eq., § 498. The eighth section of our statute concerning securities provides that one surety at the suit of another shall not be liable to pay more than his due proportion of the original demand, but what is his due proportion will vary according to the circumstances. Thus, if there are three sureties, and all of them are solvent, and one pays the debt, each of the others will be liable to him for one-third of the amount only; but if one of them is insolvent, the other will be liable for one-half.

In this case it seems that Glascock was the principal debtor, and that the other five parties to the note were sureties. Now if all

the sureties were solvent, and the defendant paid the debt, he could only require M. J. Winn to contribute one-fifth part of it, and therefore could only ask to have one-fifth abated, and could only complain of the conduct of the plaintiff in releasing the levy of the execution to that extent. But if the other sureties are insolvent, M. J. Winn would be bound to contribute to the defendant one-half instead of one-fifth of the debt; in which case, if the plaintiff had released M. J. Winn, he could only demand of the defendant the other moiety; and, on principle, the same result must follow if he could have made half the debt but for his improper interference with the execution. These questions can not be determined from the meagre statement of facts in the special verdict. It does not appear whether the other sureties were solvent or not.

The statute authorizes this court to remand a cause when the facts in a special verdict are insufficiently found (2 R. C. 1855, p. 1301, § 35); and the judgment then will be reversed and the cause remanded; Judge Napton concurring. Judge Scott not sitting.

CHAPTER VII.

MISCONDUCT OF THE PRINCIPAL, ACCIDENT, MISTAKE, OR DEATH OF THE SURETY.

The Effect of the Death of the Surety.

In re CRACE.

BALFOUR v. CRACE.

L. R. 1 Ch. Div. 733 (Eng.). 1902.

Point of law.

In 1882 the plaintiff, Blayney Reynell Balfour, who was the owner of certain estates in Ireland, appointed one Dolling to act as agent to his estates and receiver of the rents thereof, and, in consideration of this appointment, Dolling, and his father-in-law, John Gregory Crace, as his surety, executed a joint and several bond, dated June 25, 1883, for the sum of £3,000. in favor of the plaintiff. This bond was given at the plaintiff's request by way of security for the due performance by Dolling of his duties and obligations as the plaintiff's agent and receiver.

The bond was in the following form:

"Know all men by these presents that we, Caledon Josias Radcliffe Dolling, of 34 Mountjoy Square, in the city of Dublin, Esquire, and John Gregory Crace, of No. 38 Wigmore street, London, in the county of Middlesex, and of Springfield, Dulwich, Esquire, are jointly and severally held and firmly bound to Blayney Reynell Balfour, of Townley Hall, Drogheda, in the city of Louth, Esquire, in the sum of £3,000., to be paid to the said Blayney Reynell Balfour, or his attorney, his executors, administrators, or assigns, for which payment to be well and truly made we bind ourselves and each of us, one and each and every of our heirs, executors, and administrators, jointly and severally, firmly by these presents."

The bond then recited that Dolling had previously been employed by the plaintiff's predecessor in title, B. T. Balfour, as agent of the estates, and proceeded as follows:

"And whereas, the said Blayney Reynell Balfour has appointed the said C. J. R. Dolling his agent or receiver of the rents, issues, and profits of all his estates in Ireland; and whereas, upon such appointment of the said C. J. R. Dolling as aforesaid the said B. R. Balfour required the said C. J. R. Dolling to enter into security for the sum of £3,000; and whereas, the said J. G. Crace has consented to become surety for the said C. J. R. Dolling: Now, the condition of the above obligation is such that, if the above bounden C. J. R. Dolling shall pay or cause to be paid to the said B. R. Balfour all sums of money which shall represent the rents, issues, and profits of the said estates payable to the said B. R. Balfour, as executor of the said B. T. Balfour, and shall and will from time to time, and at all times hereafter as often as requested by the said B. R. Balfour, his executors, administrators, or assigns, well and truly pay or cause to be paid unto the said B. R. Balfour, his executors, administrators, or assigns, all such sum or sums of money as he, the said C. J. R. Dolling, shall have had or received of the said rents and profits of the said estates, and shall and will render to the said B. R. Balfour and his heirs, executors, administrators, and assigns true, just, full, and perfect accounts of all and every such sum and sums of money as shall be by him had or collected from the tenants and occupiers of the said estates, or from or on account of the rents and profits of the said estates, or any part thereof, or for or on account of the said B. R. Balfour, his heirs, executors, administrators, or assigns, and shall and will, while he shall continue to act as such agent or receiver, well, justly, truly, and honestly in every respect conduct himself in the said office of agent or receiver of the said rents, then this obligation and every matter and thing therein contained shall be void and of no effect; otherwise, the same shall remain in full force and virtue in law."

Dolling continued to act as the plaintiff's agent and receiver until about February, 1900; but in April, 1900, he executed an assignment to a trustee for the benefit of his creditors, and left the country, having failed to account to the plaintiff for large sums received on his behalf.

J. G. Crace died on August 13, 1889, having by his will appointed the defendants to be his executors. This was an action by the plaintiff seeking to make the defendants liable upon the bond.

The defendants pleaded that the liability of their testator under the bond ceased upon his death.

By an order dated October 28, 1901, upon the application of the plaintiff, and upon an admission by him that the said J. G. Crace died on August 13, 1889, and that he, the plaintiff, had notice of the death shortly after that date, the following point of law was directed to be tried before any evidence was given or issue of fact tried, namely: "Whether the liability (if any) of the said J. G. Crace under the bond dated the 25th of June, 1883, was determined on the death of the said J. G. Crace, or when such death first became known to the plaintiff." During the course of the argument the form of the question was slightly amended, and as amended read as follows: "Whether the liability (if any) of the said J. G. Crace under the bond was determined immediately or otherwise by the mere fact of his death coming to the knowledge of the plaintiff."

JOYCE, J. I think it is undoubted law that a continuing guarantee not under seal for future advances, if not so framed as to become operative before it is acted on, may be revoked or withdrawn altogether before being acted on, and as to further or future transactions may be terminated at any time unless the contrary be expressly stipulated. Now, the reasons for this in the case of such a guarantee are, I think, pretty obvious on a moment's consideration, and they are put very lucidly in the judgment of Erle, C. J., in Offord v. Davies, 12 C. B. (N. S.) 748.

When such a guarantee is under seal, I think it has been held at law that the guarantor is not entitled by notice to determine its operation. But in equity, I think, even in the case of a continuing guarantee under seal, such a guarantee as that I have mentioned, where, as Lush, L. J., puts it in the case of Lloyd's v. Harper, 16 Ch. D. 319, "the consideration is fragmentary, supplied from time to time, and therefore divisible," the operation of the guarantee as to future transactions may be determined by notice. Now, the right to determine or withdraw a guarantee by notice forthwith cannot possibly exist, in my opinion, when the consideration for it is indivisible, so to speak, and moves from the person to whom the guarantee is given once for all, as in the case of the consideration being the giving or conferring of an office or employment upon any person whose integrity is guar-

anteed. It is impossible that the guarantor should be entitled by notice, unless he has expressly so stipulated, to determine that guarantee instanter. Time must be allowed—at all events, it is admitted that some time must be allowed—for a lawful determination of the employment by the person to whom the guarantee is given, and I think, with reference to a guarantee of the nature which we have to consider in the present case, many other considerations are applicable besides merely a lawful determination of the employment by giving six months' notice, or something of that kind. As I said in the course of the argument, six months' notice might determine the employment just in the midst of the audit or receipt of the rents; or the employer might be placed in such a position with reference to the person employed that it might be most inadvisable, and injurious to him to put an immediate end to the employment.

If, however, such a guarantee can be determined by notice at all, the question what length of notice the employer must necessarily be entitled to, I think, has not been determined, and must depend upon the circumstances of the particular case. Now, that being so, there is no difficulty whatever to my mind in answering the question which was argued before me as it originally stood. It would have been impossible to hold that with respect to this guarantee, where there is no stipulation to the contrary, the liability of the guarantor under the bond was determined immediately, either on the death of the guarantor or on the fact of his death coming to the knowledge of the person to whom the guarantee was given. But I am told that that is not the real question, and it was proposed to alter the question in a form which was partly suggested by myself, and the question I have to decide is whether the liability, if any, of Mr. Crace under the bond, was determined, immediately or otherwise, by the mere fact of his death coming to the knowledge of the plaintiff. Now, whatever the true answer to that question may be, and whether such a guarantee as this can be determined by notice or not, I certainly agree with what Romer, J., says in In re Silvester, (1895) 1 Ch. 573, 577, where he observed, on Lord Bowen's decision in Coulthart v. Clementson, 5 Q. B. D. 42: "I desire to add that I do not assent to the general proposition that, where a person who is himself entitled to the benefits of a contract of guaranty has notice of the death of

the guarantor and that he left a will, he is, without more, affected with notice of the contents of the will, or is bound to assume that prima facie it would be a breach of trust on the part of the executor not to give notice to determine the liability."

I desire to express my entire agreement with that, whatever the proper answer to the question whether such guarantee as that which we have to consider in this case can be determined by notice or not. Really what we have to decide is this: Whether, when the guarantee is of this kind, given as part of the consideration for the appointment to an office or employment of a person by another to whom the guarantee is given, the law requires the guarantor, in case he desires the guarantee to be determinable by notice or by his death, to have it expressly so stipulated; or does the law require the person to whom the guarantee is given to have it expressly so stipulated if the guarantee is not to be determined by notice or by the death of the guarantor? Well, after listening to the argument and giving some consideration to the case, I have come to the conclusion that upon the whole, where an office or employment is conferred in consideration of such a guarantee as that in this case, it is safer to hold that the guarantor must expressly so stipulate or provide if he desires the guarantee to be determinable by notice, or to be determined by his own death. And in coming to that conclusion I rely on Gordon v. Calvert, 2 Sim. 253, 4 Russ. 581, 29 R. R. 94, and also upon what I understand to be the reasoning of the Lords Justices in Lloyd's v. Harper, 16 Ch. D. 290, although I have not forgotten that there was a special fact in that case, namely, that the person whose integrity was there guaranteed was in what was analogous to employment which could not be determined by Lloyd's.

Therefore I can answer this question, as altered, by saying that the liability, if any, of the said John Gregory Crace under the bond dated June 25, 1883, was not determined, immediately or otherwise, by the mere fact of his death coming to the knowledge of the plaintiff.

PART IV

RIGHTS OF THE CREDITOR

CHAPTER VIII.

THE RIGHT OF THE CREDITOR TO THE SECURITIES HELD BY THE SURETY.

General Nature of the Right.

FIRST NAT. BANK v. DAVIS ET AL.

87 Mo. App. 242. 1901.

SMITH, P. J. Defendants, John Davis as principal and Patrick Davis as surety, executed their promissory note to the plaintiff bank for $1,152, due 12 months after date, and contemporaneously with the execution of said note the defendant John Davis executed to his co-defendant and surety Patrick Davis a deed of trust on his land to secure the latter "against any loss he may sustain by reason of his said suretyship." The value of the security so given was in excess of the amount of the debt. When the debt fell due, neither of the defendants were in condition to pay it. The time for payment was extended, but whether or not with the consent of the surety the evidence is sharply in conflict. Both of the defendants, after the giving of the note and mortgage, became insolvent.

The object of this suit was to recover judgment against the principal debtor on the said promissory note, and to have said deed of trust declared a lien on the land therein described as of the date thereof, for the purpose of securing to the said creditor the payment of the amount adjudged in said promissory note, to foreclose the equity of redemption of the surety and his wife, and that the same be sold clear of the right of the said surety under said deed of trust for the purpose of satisfying the said

judgment, etc. The question here for decision is whether or not the creditor can have recourse in equity to satisfy his debt to the mortgage security taken by the surety from the debtor for his indemnity.

The property of the principal debtor belongs to the creditor, which, under certain circumstances, the latter may subject in the hands of the surety to the satisfaction of his debt. The holder of such indemnity is a trustee for the creditor. Hampton v. Phipps, 108 U. S. 260, 2 Sup. Ct. 622, 27 L. Ed. 719; Leggett v. McClelland, 39 Ohio St. 624; McDougall v. Walling, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849. If the debtor gives his surety indemnity, the creditor may avail himself of it by subrogation, even though in the first instance it was unknown to him. Leggett v. McClelland, supra; Hopewell v. Bank, 10 Leigh (Va.) 206; McCollum v. Hinckley, 9 Vt. 143. The rule is well settled that, where a security is given by a principal to his surety, it operates *eo instanti* as a security to the creditor for the payment of his debt.

The security so given is a trust fund, and is regarded in equity as a trust fund, for the payment of the debt. Taylor v. Bank, 87 Ky. 398, 9 S. W. 240. The security is for the debt, as well as for the ultimate protection of the surety. It is, as has been stated, at once clothed with a trust character and the creditor immediately acquires a right and interest in it that cannot be defeated by the surety; and, as said in substance by Judge Napton in Logan v. Mitchell, 67 Mo. 524: The surety cannot alter or impair the creditor's right, and if the security was originally taken, not only to indemnify the surety, but to secure the creditor, any action of the former would be powerless to affect the latter. And in Bank v. Rich [106 Mich. 319, 64 N. W. 339], it is said that, where a surety for the payment of a debt received security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security, and it makes no difference that such principal did not act upon the credit of such security in the first instance.

But suppose it to be true, as the debtor here contends, that the creditor did extend or enlarge the time of payment of the debt; did that have the effect to discharge the surety and withdraw the security from the operation of the trust in which it had been placed? Where a surety, as here, is fully indemnified in prop-

erty, he is estopped to set up against the creditor the defense that the time of payment has been extended in favor of the principal without his consent, because such surety is the virtual principal, and ought to be bound by every enlargement of the time of payment quite as much, or perhaps more than the principal debtor. A surety who has received an indemnity equal to the debt for which he is bound, and which he may, as here, convert into money, stands in about the same position as a surety who has received of the principal an amount in money. In such case the surety is a principal, and cannot be permitted to claim the privilege of a strict surety without indemnity. Brandt on Suretyship, § 349; McDougall v. Walling, supra; Smith v. Steele, 25 Vt. 427, 60 Am. Dec. 376; Chilton v. Robbins, 4 Ala. 223, 37 Am. Dec. 741; Moore v. Paine, 12 Wend (N. Y.) 123. And it is certainly clear that he can make no such defense while he holds on to the security. This is not a case where a stranger has chosen to bestow upon a surety a benefit and a preference from considerations personal, in order to make good to him exclusively any loss to which he might be subjected in consequence of his suretyship for another. Of course, in such case the creditor could not, upon any ground of priority in interest, claim any share or interest in the benefit of such benevolence.

If the surety is, as we have stated, estopped to claim a release on the ground that there has been an extension of the time of payment of the debt because in equity he occupies the attitude of a principal himself, it inevitably follows that his co-principal, the original debtor, cannot be heard to claim any such release of his own property from the operation of the trust in which he had placed it to secure the payment of his own debt. He stands in the situation of one who has given a mortgage to secure his own debt, and cannot by any act of his deprive the mortgagee of the benefit of the mortgage security until the debt is paid. The status of the parties at the time the suit was commenced was the same that it was when the mortgage, or, which is the same thing, the deed of trust, was given. The extension of the time of payment did not alter or change the rights of the parties. The security was afterwards, as before, bound in equity for the payment of the creditor's debt. The surety, by neglecting to convert the security and pay the debt, cannot thereby defeat the right of the creditor to have it subjected to the payment of his debt, for

it was a security provided as well for him as for the surety. It seems to us that a bare statement of the facts in this case are sufficient to show that upon the principles of natural justice and equity the property of the debtor, which he placed in the hands of the trustee surety as an indemnity, ought to be subject in the hands of the trustee surety to the satisfaction of the debt of the creditor.

Accordingly, we think that the decree which was for the plaintiff in conformity to the prayer of his petition, to which allusion has been made, should be affirmed; and it is accordingly so ordered. All concur.

LEADING ILLUSTRATIVE CASES LAW OF MORTGAGES—REAL AND CHATTEL

PART I

THE MORTGAGE TRANSACTION

CHAPTER II.

THEORIES OF A LEGAL MORTGAGE.

The Modern Title Theory.

TOOMER v. RANDOLPH.

60 Ala. 356. 1877.

[Action of garnishment by plaintiff against defendant as debtor of one Philip B. Cabell. Defendant held a note of Cabell secured by mortgage on certain real estate of which he had taken possession. After default by Cabell in the payment of the note, defendant exercised a power of sale contained in the mortgage. Plaintiff is a creditor of Cabell and a second mortgagee, and by this proceeding seeks to collect his debt out of moneys alleged to be owing to Cabell. The lower court refused to enter a judgment against the defendant and discharged him.]

BRICKELL, C. J. A mortgagee, if there is not in the mortgage a stipulation to the contrary, or a reservation by the mortgagor of possession until default in the payment of the mortgage debt, has the immediate right of entry, and may eject the mortgagor or his tenants. Duval v. McLoskey, 1 Ala. 737; Welsh v. Phillips, 54 Ala. 309. The theory of a mortgage, prevailing in this State, is that, at law, it creates in the mortgagee a direct, immediate estate in the land—a fee simple, unless

otherwise expressly limited. The estate is conditional—annexed to the fee is a condition, which may defeat it. If the mortgagor, not having reserved the right of possession until default in the performance of the condition, remains in possession, he is the mere tenant at will of the mortgagee. After the law day, and default in the performance of the condition, the estate vests absolutely in the mortgagee—the fee is freed from the condition annexed to it. Nothing remains in the mortgagor but the equity of redemption, of which, as between mortgagor and mortgagee, courts of law do not take notice. Before default, all that remains in him is the right to perform the condition, and thereby restore his original estate. Pauling v. Barron, 32 Ala. 11; Barker v. Bell, 37 Ala. 358; Welsh v. Phillips, supra.

In courts of equity, the theory of a mortgage is, that until foreclosure it is a mere security for a debt, the mortgagor continuing the real owner of the fee. From this theory results the general principle, that a mortgagee in possession, before or after default in the payment of the mortgage debt, and before foreclosure, is a trustee of the rents and profits for the mortgagor, and bound to apply them in extinguishment of the mortgage debt. Davis v. Lassiter, 20 Ala. 561; 2 Wash. Real Prop. 221. All reasonable expenditures for taxes, necessary repairs, and other necessary expenses incurred on account of the estate, the mortgagee is allowed to retain from the rents and profits; and it is the balance only which may be applied in extinguishment of the mortgage debt. An accounting is necessary to the ascertainment of the balance. The law does not apply the balance of the rents and profits to the mortgage debt; for, at law, they accrue to the mortgagee, as the owner of the legal estate. It is in equity only the application is made, in the nature of an equitable set-off, and as an incident to the right of redemption. Hubbell v. Moulson, 53 N. Y. 225.

2. If it is admitted that the mortgagor, notwithstanding the second mortgage to the appellants, has a right to compel the application of the rents received by the appellee while in possession, to the payment of the mortgage debt, the remedy is exclusively in equity, and is incidental to the right of redemption. In a court of law, the appellee is regarded as having received only and simply the issues of his own estate. A garnishment is strictly a legal proceeding, operating only on the rights of

the defendant in attachment of judgment, which he could in an action at law enforce in his own name. It cannot be converted into a method of drawing within the jurisdiction of courts of law matters and rights of purely equitable cognizance. Harrell v. Whitman, 19 Ala. 135; Roby v. Labuzan, 21 Ala. 60; Godden v. Pierson, 42 Ala. 370; Henry v. Murphy, 54 Ala. 246.

What may be the rights of the appellants, as subsequent mortgagees, cannot be considered or determined in the present proceeding. A garnishment is not a remedy for the enforcement of any cause of action vesting only in the creditor suing it out. Its whole score and operation is to subject legal demands recoverable only by the debtor, or property of his which is subject to execution. Henry v. Murphy, supra; Thompsen v. Wallace, 3 Ala. 132. The judgment is affirmed.

The Lien Theory.

TRIMM v. MARSH.

54 N. Y. 599. 1874.

This was an action for an accounting as to the amount due upon a bond and mortgage, and for the recovery of the possession of the mortgaged premises, upon payment of the amount due.

In 1858 one Ridgway, being the owner of certain premises situate in the City of New York, mortgaged them to an insurance company to secure $2,000; the insurance company assigned the mortgage to the defendant, Sarah A. Marsh. Ridgway afterward conveyed the premises to the plaintiff Brown, who subsequently, in October, 1865, entered into an agreement with plaintiff, Trimm, to convey the same to him. In 1861 the defendant Sarah commenced an action to foreclose this mortgage, making plaintiff Brown and others parties defendant, and obtained judgment of foreclosure. The premises were sold under the judgment in 1862, and defendant, Sarah A. Marsh, became the purchaser, and received a sheriff's deed. Immediately after the sale she entered into possession of the premises, and she or the other defendant has ever since been in possession. In October, 1864, by an order of the Supreme Court, granted after

due notice and hearing the parties interested, the foreclosure sale was set aside and declared null and void, and a resale was ordered, which never took place. In November, 1864, the defendant, Sarah A. Marsh, recovered a judgment against plaintiff Brown, which was duly entered and docketed, and in 1865 she caused an execution to be issued upon said judgment to the sheriff of New York, who, in May of the same year, sold all "the right, title and interest" of which the said Elizabeth C. Brown was seized or possessed in the said land, the said Sarah A. Marsh becoming the purchaser and taking the sheriff's certificate of sale. In September, 1865, she conveyed the said premises by deed to the other defendant, and in September, 1866, after the commencement of this suit, she also transferred to him the sheriff's certificate, and he soon after received the sheriff's deed. The defendant, William B. Marsh, had notice of all the facts when he took his title, and was not a bona fide purchaser for value. Since the defendants went into possession of the premises they have assumed and claimed an absolute title, free from any right of redemption in the plaintiffs or either of them.

The plaintiffs commenced this action to redeem the said premises from the mortgage and judgment of foreclosure, and the principal defense relied on by the defendants was their title under the judgment and execution sale against plaintiff, Brown. The referee decided the same in favor of plaintiffs, holding that the execution sale, being made by the assignee of the mortgagee in possession, was null and void and conferred no title upon the purchaser.

EARL, C. The only legal proposition involved in this case, which we deem it important to consider, is whether a mortgagee of real estate in possession can cause the equity of redemption of the mortgagor to be sold on an execution and become the purchaser of the same, and, after obtaining the sheriff's deed, set up his title thus acquired against the claim of the mortgagor to redeem from the mortgage in an equitable action commenced by him for that purpose; or, to state the proposition in other words, has the owner of the equity of redemption of mortgaged premises, after default and after the owner of the mortgage has taken possession, such an interest in the premises as can be sold upon execution against him? If this question be answered

in the affirmative, the decision of the General Term was right and must be affirmed. The respective rights of the mortgagor and mortgagee in the land mortgaged have been the subject of much discussion, and it is impossible to reconcile all that learned judges and writers have said upon the subject. By the common law of England the legal estate was vested in the mortgagee, to be defeated by the performance of a condition subsequent, to wit, payment at the law day. In default of such payment, the title became absolute and irredeemable in the mortgagee. But, two centuries ago, courts of equity assumed jurisdiction to relieve mortgagors against forfeitures, and, thenceforth, in equity a mortgage has been regarded as a mere security, as creating an interest in the mortgaged premises of a personal nature, like that which the mortgagee has in the debt itself.

The common-law rule, as modified by the equitable principles above alluded to, still prevails in England. There the courts still hold that the legal title passes to the mortgagee, and becomes by default absolutely vested in him at law, and that the mortgagor has, after default, nothing but an equity of redemption to be enforced in a court of equity. After default the mortgagor can again become reinvested with the title to his land only by a reconveyance by the mortgagee. The same rule prevails in the New England States, and many other States of the Union. But this common-law rule has never, to its full extent, been adopted in this State. Here the mortgage has, both in law and equity, been regarded as a mere chose in action, a mere security of a personal nature.

At common law, payment or tender at the law day extinguished the lien of the mortgage and reinvested the mortgagor, without a reconveyance by the mortgagee, with his title. But tender of payment after the law day did not have this effect, and in such case a reconveyance was necessary; and such is still the rule in England and in many of the States of the Union. But it has always been the law of this State that payment or tender, at any time after the mortgage debt became due and before foreclosure, destroyed the lien of the mortgage and restored the mortgagor to his full title. As the mortgagee had no title, a reconveyance was not required by the law as expounded by our courts. So that here the term law day, which occupies such a prominent place in the early discussions as to mortgages, has

no particular significance. The mortgagor has his "law day" until his title has been foreclosed by sale under the mortgage, and it is a misnomer in this State to call the mortgagor's right in the land, before or after default, an equity of redemption, a mere right to go into equity and redeem. This was a proper description of the mortgagor's right in the land according to the law as expounded in England. But in this State the interest of the mortgagor in the land is the same before and after default, and is a legal estate, with all the incidents and attributes of such an estate.

But it is claimed by the learned counsel for the appellants that the position of the mortgagee is materially changed when he gets possession. It is true, notwithstanding the provision of the Revised Statutes, which prohibits an action of ejectment by the mortgagee to obtain the possession of the mortgaged premises, that after he has lawfully obtained the possession he may retain it until the debt secured by the mortgage has been paid. Before taking possession the mortgagee has no title in the land. How can the mere possession change the title from the mortgagor to the mortgagee, or in any way diminish the estate of the one or enlarge the estate of the other? Before taking possession the mortgagee had a mere lien upon the real estate pledged for the security of his debt. After possession he has in his possession the property pledged as his security, the title remaining as it was before. The mortgagor's title is still a legal one, with all the incidents of a legal title subject to the pledge, and the mortgagee's interest is still a mere debt secured by the pledge. If the mortgagee should die in possession, the debt would still go to his personal representatives to be administered as personal estate, and the mortgagor's title would go to his heirs. Payment, or even tender, would destroy the mortgagee's right to retain possession, and would enable the mortgagor to maintain ejectment to recover possession. The mortgagee, in such case, so far from having any title, holds the land as the land of the mortgagor, and is liable to account to him for the rents and profits. Judge Comstock, in Kortright v. Cady (supra), says: "The mortgagee's right to bring ejectment, or, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to recover or retain possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt,

and has no relation to a title or estate in the land. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor and creditor between him and his mortgagor, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledge, but where its object is accomplished it is neither just nor lawful for an instant longer."

I cannot doubt, therefore, that the mortgagor, after default, and after the mortgagee has taken possession, has such an estate in the land as can be sold upon execution. It is not necessary to decide whether, in such a case, the mortgagee has also such an estate in the land as can be sold upon execution, because, if he has, it does not follow that the mortgagor has not also such a right. They might each own an estate which could be sold. But I am of opinion that the mortgagee has no estate in the land which can be sold on execution. His interest is a mere chose in action, a debt secured by a pledge of real estate. His debt is not merged in the real estate by the possession. He has no interest in the real estate which he can sell, or which can be sold separate from the debt. Such a sale would convey nothing. Whoever took the real estate from him would take it subject to the same liability as he was under to account for the rents and profits to the mortgagor. It has been decided that a transfer of the mortgage without the debt is a mere nullity (Merritt v. Bartholick, supra).

I am, therefore, of the opinion that the title of the defendant under the execution sale was valid, and that the plaintiff had no right to redeem.

The order of the General Term must be affirmed, and judgment absolute rendered against the plaintiffs, with costs.

An Intermediate View.

BARNETT v. TIMBERLAKE.

57 Mo. 499. 1874.

SHERWOOD, J. The defendant on the 7th day of March, 1871, was indebted to one Galbreath in the sum of $350, for which he gave his promissory note, due in one year after date.

Several persons joined with the defendant in the execution of this note, only, however, as sureties.

A few days after the execution of the note, the defendant executed to the plaintiff, as trustee, a deed of trust of certain personal property. The granting words in this instrument were: "bargain and sell, convey, deliver and confirm." The condition of the deed was that the defendant should pay the note at its maturity, and thus save his sureties harmless; in which case, the property so conveyed was to be released at his cost; but if default were made in the payment of the note the deed was to remain in full force, and the trustee to proceed to sell the property, etc., etc.

There was no delivery of the property mentioned in the deed, to the trustee, but the defendant retained possession until some time in the succeeding fall, when it was taken from him by process issued in behalf of the plaintiff, who claimed in his petition that he was entitled to its possession. The defendant's answer was a general denial. The note was duly paid at its maturity, and the defendant exhibiting it to the plaintiff, demanded his property; but this demand was only partially complied with, the plaintiff retaining a portion of it which he sold after the note was satisfied and the proceeds were applied to the payment of the costs which had accrued in respect to the property and its keeping, in consequence of suit brought.

The whole case turns upon this: Whether the court below erred in holding that the trustee need not await the maturity of the note, but could, under the deed, take immediate possession of the property.

The law is well settled, that, although a trustee or mortgagee of personal property is, after default made or condition broken, entitled to the possession, and considered in law the owner of the property just mortgaged, yet prior to that time, it is equally certain that no such right of either possession or ownership exists. The case of Sheble v. Curdt is decisive of this point. The granting words there employed were, "sells, transfers and sets over;" but no difference is perceived between the legal effect of those words, and those in the case at bar. In neither case did the grant become an absolute one, until condition broken. If the trustee or mortgagee is justly apprehensive that the property will be eloigned prior to the maturity of the demand which the

deed is given to secure, he is not without remedy; but that remedy certainly does not consist in such an action as that to which the plaintiff has in the present instances resorted; for the obvious reason that such action must be based on the right of the plaintiff to the immediate possession of the property sued for. But as above seen, no such right attaches in the trustee until default occurs.

The judgment is reversed and the cause remanded; all the judges concur.

CHAPTER III.

THE EQUITABLE MORTGAGE.

Deposit of Title Deeds.

LACON v. ALLEN.

3 Drewry 579 (Eng.), 106 Revised Rep. 443. 1856.

This was a suit by persons claiming to be equitable mortgagees by deposit of title deeds of William Cock. The defendants were the assignees of Cock, who had become bankrupt, and Allen and Underwood, previous mortgagees of Cock.

The premises mortgaged were several, but the premises on which the question principally turned, the decision on those governing the rest, consisted of certain copyhold property called the "Bear Inn," and premises adjoining thereto.

The question in the suit was, whether the plaintiffs were equitable mortgagees of the property above described, and of other property purporting to be mortgaged in a somewhat similar manner, or whether the assignees of the bankrupt were entitled to the estates purporting to be in mortgage to the plaintiffs. * * *

THE VICE-CHANCELLOR. The question here is how the Court will deal with certain deposits of deeds by way of equitable mortgage; whether under the circumstances, the effect was to create an equitable mortgage.

I will take first the case of the "Bear," as being the strongest against the mortgagee. As I understand the facts, the property was copyhold; of course the title consisted principally of the copy of the court rolls. A person of the name of Lubbock was the owner and had been admitted, and he sold that property to Shepeard for quiet enjoyment. Shepeard is the immediate vendor of Cock. It is clear that the admission of Lubbock is part of the title. Cock mortgaged to Allen and Underwood, and he gave them the instrument of conveyance by which he held, and he gave them a mortgage deed; and these were the only instruments that he gave to those mortgagees. The only other documents

that he possessed were the official copy of the admission of Lubbock, the abstract of Lubbock's title, and the bond which Lubbock had given to Shepeard. These were all the documents that he had, and for the purpose of an equitable mortgage he deposited these in the hands of Messrs. Lacon.

Now, since the case of Russell v. Russell, this is well established, that supposing A, owing to B, deposits the title deeds of his estates with B for the purpose of a security, even without any writing, it is a good equitable mortgage, it gives B a lien; and, notwithstanding the expressions of regret of Lord Eldon that the law should be so, even in his time, we find him saying he could not disturb it: since that time it has been acted upon over and over again. That doctrine cannot now then be disturbed. Then the question is, is it necessary that every title deed should be deposited? Suppose the owner has lost an important deed, could he not deposit the rest? In each case we must judge whether the instruments deposited are material parts of the title; and, if they are, it is not sufficient to say there are other deeds material, or even more material, if there is sufficient evidence to show that the deposit was made for the purpose of creating a mortgage. In this case everything was deposited that the mortgagor had; at the time when he was called upon to give security he deposited all that he had, and the reason why he did not deposit more was that he had already given another mortgage, and parted with the deeds. Unless then I am to determine that every title deed of a mortgagor necessary to show the title must be deposited, I must decide that there is a sufficient deposit in this case to create an equitable mortgage.

The other transactions were stronger in favor of the plaintiffs as equitable mortgagees, and therefore were not discussed, it being admitted that the decision on the "Bear Inn" property governed them. The decree was therefore for the plaintiffs.

Agreement to Give a Legal Mortgage.

PAYNE v. WILSON.

74 N. Y. 348. 1878.

FOLGER, J. * * * It is contended that though the mortgage to Halstead be void, it is the result of a prior existing agree-

ment before that resting in parol, and which constituted an equitable mortgage. The facts on which this contention rests are these: Palmer was the owner of the lands; he agreed in writing to sell to Doran, and to advance moneys for the putting up of buildings; Halstead, the subsequent mortgagee, agreed with them in writing to furnish materials for the buildings to the amount of $8,000; and they agreed to give him for one-half the amount a mortgage on some one of the houses, specifying the terms of the mortgage; he did furnish materials, pursuant to the agreement, to that amount; and also in pursuance of it Palmer did make and deliver to Halstead the written mortgage.

An equitable mortgage may be constituted by any writing from which the intention so to do may be gathered, and an attempt to make a legal mortgage, which fails for the want of some solemnity, is valid in equity: Miller on Eq. Mortgages, 1, 2; and it has been held, that an agreement for a mortgage is, in equity, a specific lien upon the land: In re Howe, 1 Paige, 125, Chase v. Peck, 21 N. Y. 581; and that an equitable mortgage thus created, is entitled to a preference over subsequent judgment creditors: 1 Paige, supra, Robinson v. Williams, 22 N. Y. 386. Though it has been held, that, save in exceptional cases, such as accident, fraud or mistake, the agreement must be in writing, the case in hand is not affected by that ruling.

These principles are not questioned by the appellant; but it is urged that facts exist, which prevent the operation of them to the benefit of Halstead. We have noticed that the agreement of Palmer, Doran and Halstead, was not for a mortgage on the whole premises, nor for any part of it with specific indication of that part. It was for a mortgage on one of the houses then going up, but without pointing out the particular house. Such a designation of the property to be charged, though indefinite to some degree, does not impair the effect of the equitable mortgage: Sir Simeon Stewart's Case, cited 2 Schoale & Lefroy, 381; and 3 Vesey, 576. Doubtless, there must be an identification of the property, so that the equitable mortgagee may say, with a reasonable degree of certainty, what it is that is subject to his lien. In this case, it was certain that one building and its lot, out of a number, were the subject of the equitable lien. As the lien of the appellant is upon all of the premises, he cannot be injuriously affected by the application of the equitable lien to

any one of the number. Besides that, before he acquired his lien, Palmer and Doran had specified, to Halstead's acceptation, the one of the houses which should be the subject of the mortgage to him. So that we consider, that in this case, without anything further, the designation of the property to be charged with the intended legal mortgage, was sufficient. Besides that, however, we have seen that an attempt to make a legal mortgage, which fails for the want of some solemnity, is valid in equity. The instrument which we have assumed to be void, as in conflict with the one hundred and thirty-seventh section, was such an attempt. But it did specify by metes and bounds and particular description, the one lot which it was meant to subject to the payment of the money to Halstead, in accordance with the agreement. This instrument was prior in creation to the mechanic's lien, and, under the rule we have recited, had or continued an equitable priority to it.

Agreement to Satisfy Obligation Out of Specified Property.

BRITT v. HARRELL.

105 N. C. 10. 1890.

The plaintiffs allege, in substance, that in February, 1888, Dunn & Kitchen were engaged, in the county of Hertford, in getting railroad ties for market, and while so engaged the plaintiffs made advances to them in money and supplies to a large amount; that on the 13th day of February, 1888, "said Dunn & Kitchen were indebted to said Britt & Lawrence in the sum of $132.26, balance on said supplies," for which they executed their promissory note, in words and figures as follows:

"$132.26. Winton, N. C., February 13, 1888.

"We promise to pay Lawrence & Britt, out of the proceeds of certain railroad ties we now have in Hertford County, amounting to about forty-two hundred, the sum of one hundred and thirty two 26/100 dollars, with interest thereon from December 3d, 1887, to be paid as follows: First deducting eighteen hundred ties for O. H. Perry, from the first amount hauled, then we will pay Lawrence & Britt, out of the remainder, at the rate

of ten cents a piece for all delivered to transportation until they are paid in full, and authorize purchaser to retain said amount for them.

"Witness our hands, this the 13th day of February, 1888.

"Witness: Dunn & Kitchen.

"R. W. Winborne."

The said paper-writing was duly proved and registered in Hertford County on the 14th of February, 1888, and "thereafter Dunn & Kitchen did not cut and hew any more ties in said county, and said 4,200 ties were all that they had in said county at that time;" that "about the 1st of April, 1888, Dunn & Kitchen delivered 800 ties for transportation, and left the remainder in the woods where they were cut; that about June 1st, 1888, Dunn & Kitchen abandoned the State, or kept themselves concealed therein to avoid service of summons, and with intent to defraud their creditors; and thereupon J. J. Jordan and S. J. Holloman, upon whose lands the ties were cut, sued out an attachment against them, and, under proceedings therein, the remainder of said ties, about 3,400, were sold at public sale, and the defendant, Harrell, became the purchaser; the ties so purchased were those owned by Dunn & Kitchen, in Hertford County, at the time of the execution by them of the said paper-writing, and embraced within its provisions; the defendants, J. P. Harrell and A. C. Vann, hauled to a point on the banks of the Chowan River, for transportation, 2,000 or more of the ties. No part of said note has ever been paid, and the plaintiffs allege that they have an equitable lien to have said ties subjected to the payment thereof. Dunn & Kitchen are totally insolvent, as is also Harrell, who is threatening to sell and remove said ties, and, if permitted to do so, the plaintiffs will sustain irreparable loss. Harrell purchased with full knowledge of the claim of plaintiffs, and they ask that he be restrained," etc.

DAVIS, J., after stating the case: The sole question presented in this case is, Was the paper executed by Dunn & Kitchen a chattel mortgage? Was it sufficient to constitute a lien, legal or equitable, in favor of the plaintiffs against a purchaser at a sale made by the sheriff under execution?

Whether the instrument, in itself, is a mortgage, is a question

of law to be determined by the Court. Comron v. Standland, 103 N. C. 207; Jones on Chattel Mortgages, 18.

In the case before us there is nothing in the paper to indicate that Lawrence & Britt shall "have a lien" upon the railroad ties. Nothing found therein imports a conveyance of the title to the ties. No authority is given to sell the property upon default of payment, or in any way to dispose of or control it. There is nothing to bring it within the definition of a legal mortgage. Jones on Chattel Mortgages, 1, et seq.

But it is insisted that it is an equitable assignment or appropriation of the ties to the payment of this debt, and the purchaser at the sheriff's sale had notice. We do not think it can be so considered. It was only a promise by Dunn & Kitchen to pay money, with the additional promise that they would pay it "out of the proceeds" of the ties.

While "no particular form is necessary to constitute a mortgage," yet the words must "clearly indicate the creation of a lien, specify the debt to secure which it is given and upon the satisfaction of which the lien is to be discharged, and the property upon which it is to take effect." "The statement that the creditor is to have a lien, and that on default he may take possession and sell, * * * sufficiently discloses the intent." Harris v. Jones, 83 N. C. 317, and cases cited. The instrument under review gives the plaintiff, in no event, authority to take possession and sell the ties.

A debtor says to his creditor: "I will send cotton which I have in my gin to my commission merchant and pay your debt out of its proceeds, or I will authorize him to retain it for you." The debtor sends the cotton off and sells it, or it is seized under execution and sold by the sheriff. Would the creditor, in such a case, even though he had registered the promises of his debtor, have a right, in law or equity, to follow the property and have it applied to the payment of his debt? However it might be as between the parties, one making the promises and the other relying on them, in the absence of any charge or circumstances of fraud or collusion to cheat the debtor, as to third persons, such an agreement could, in no sense, be regarded or treated as a mortgage of the cotton. * * *

The plaintiffs had nothing in addition to their note but the promises of Dunn & Kitchen that they would pay "out of the

proceeds of certain railroad ties," etc., and "authorize the purchaser to retain" the amount of their debts for them; and these promises, without a transfer of the title to the ties, as security, were worth no more, it seems, than the promise to pay the money.

Affirmed.

CHAPTER IV.

THE MORTGAGE DISTINGUISHED FROM OTHER TRANSACTIONS.

Absolute Conveyances.

OBERDORFER v. WHITE.

78 S. W. 436 (Ky.). 1904.

HOBSON, J. On May 15, 1900, Nina Iola Paine (now White) signed, acknowledged and delivered to Lewis Oberdorfer a deed by which "in consideration of one dollar and other good and valuable consideration," she conveyed to him, in fee simple, her one-third interest in a tract of land in Jefferson county worth about $9,000, in which her father, then fifty-five years old, held a life estate. On July 26, 1901, she filed this action, alleging that the deed was only intended as a mortgage, and seeking to have it so adjudged. Oberdorfer and his wife, Sophia, were made defendants to the action; he having on May 22, 1900, conveyed the land voluntarily to her. On final hearing the court set aside the deed from Oberdorfer to his wife as fraudulent, and adjudged the deed executed by Miss Paine to be good only as a mortgage for $407.39. From this judgment, Oberdorfer and wife appeal.

The evidence fully sustains the learned chancellor. It leaves no question that the grantor understood she was making a mortgage on the property. While there is some conflict in the evidence as to the amount paid by Oberdorfer, when we consider the circumstances, we have no doubt that the amount fixed by the chancellor is correct. A deed absolute on its face may be shown to have been executed as a mortgage. The rule on this subject is thus well stated in 3 Pomeroy's Equity, § 1196: "Any conveyance of land absolute on its face, without anything in its terms to indicate that it is otherwise than an absolute conveyance, and without any accompanying written defeasance, contract of purchase, or other agreement, may in equity, by means of extrinsic and parol evidence, be shown to be a mortgage, as be-

tween the original parties, and as against all those deriving title from or under the grantee, who are not bona fide purchasers for value and without notice. The principle which underlies this doctrine is the fruitful source of many other equitable rules that it would be a virtual fraud for the grantee to insist upon the deed as an absolute conveyance of the title, which had been intentionally given to him, and which he had knowingly accepted, merely as a security, and therefore in reality a mortgage. The general doctrine is fully established and certainly prevails in a great majority of the States, that the grantor and his representatives are always allowed, in equity, to show, by parol evidence, that a deed absolute on its face was only intended to be a security for the payment of a debt, and thus to be a mortgage, although the parties deliberately and knowingly executed the instrument in its existing form, and without any allegations of fraud, mistake, or accident in its mode of execution. As in the last preceding case, the sure test and the essential requisite are the continued existence of a debt. If there is no indebtedness, the conveyance cannot be a mortgage. If there is a debt existing, and the conveyance was intended to secure its payment, equity will regard and treat the absolute deed as a mortgage. The presumption, of course, arises that the instrument is what it purports on its face to be—an absolute conveyance of the land. To overcome this presumption, and to establish its character as a mortgage, the cases agree that the evidence must be clear, unequivocal, and convincing, for otherwise the natural presumption will prevail. Whenever a deed absolute on its face is thus treated as a mortgage, the parties are clothed with all the rights, are subject to all the liabilities, and are entitled to all the remedies of ordinary mortgagors and mortgagees." Under this rule, the proof in the record is sufficient to sustain the chancellor's judgment. Appellant did not ask the enforcement of the mortgage. This he can have in a separate suit if his debt is not paid.

Judgment affirmed.

Conditional Sales.

DUKE v. SHACKLEFORD.

56 Miss. 552. 1879.

On December 7, 1876, W. C. Shackleford sold to Mary C. Dellahite an engine, boiler, saw, and gearing, for $725, of which $500 was paid cash, and for the balance the following note given:

"$225. On or before the 1st day of January, 1878, I promise to pay W. C. Shackleford, or bearer, two hundred and twenty-five dollars, bearing 10 per cent interest after maturity; being balance due on engine, boiler, cut-off saw, and gearing sold me this day by the said W. C. Shackleford; title to said machinery being retained by the said Shackleford until the amount is paid in full.

"It is expressly understood that said machinery is to be moved and put up near Garner's Station, on the M. & T. R. R.

"Mary C. Dellahite.

"Coffeeville, Miss., Decr. 7, 1876."

The machinery was put up at Garner's Station. The note was not paid at maturity; and Shackleford, without tendering the $500, brought replevin for the property. The land on which the saw-mill stood was sold to the Dukes before the suit was brought, who purchased with notice of Shackleford's rights, and so the suit was against them; and they bring up the case from a judgment for the recovery of the machinery.

CHALMERS, J. By the terms of the written contract, the title of the property remained in the vendor until payment in full of the note given for the deferred payment. The effect of the contract, therefore, was to leave the right of property in the seller, and to give the right of possession, until default made in payment, to the purchaser. Coupled with this right of possession was also the right in the purchaser to obtain title by payment of the price. But the period of payment having arrived, and default having been made, his right of possession terminated, and the vendor, who had all the while remained owner, became entitled to reclaim the custody of his property. In order to assert this right, it was only necessary for him to make demand for the restoration of the property or payment of

the price; and this he did. It was not necessary that he should pay back, or tender, the money received as the cash payment. This is only necessary in cases of disaffirmance and rescission of a sale on condition subsequent. But this was a sale on condition precedent; that is, there was to be no sale, properly so called, no change of title, until the full price should be paid; and the law annexes to such a sale a right in the seller to recover possession of his property upon default made, even against subsequent bona fide purchasers for value without notice. In reclaiming his property, therefore, the seller is not rescinding the contract, but is enforcing it; and hence there is no obligation to tender back anything. He is simply asserting his legal rights, in strict accordance with the express stipulations of the contract. What rights, if any, the vendee in such a contract might have in a court of chancery is not before us.

CHAPTER V.

ELEMENTS OF THE MORTGAGE.

After-Acquired Property.

HOLROYD v. MARSHALL.

10 House of Lords Cases 191 (Eng.). 1861.

An indenture of mortgage of certain machinery in a mill to secure a debt owed by Taylor to Holroyd, contained the following covenant: "That all machinery, implements and things which during the continuance of this security, shall be fixed or placed in or about the said mill, buildings, and appurtenances, in addition to or substitution for the said premises, or any part thereof, shall, during such continuance as aforesaid, be subject to the trusts, powers, provisoes, and declarations hereinbefore declared and expressed concerning the said premises; and that the said James Taylor, his executors, etc., will at all times, during such continuances as aforesaid, at the request, etc., of the said Holroyds, their executors, etc., do all necessary acts for assuring such added or substituted machinery, implements, and things, so that the same may become vested accordingly." Taylor, who remained in possession, sold and exchanged some of the old machinery, and introduced some new machinery, of which he rendered an account to the Holroyds before April, 1860; but no conveyance was made of this new machinery to them, nor was any act done by them, or on their behalf, to constitute a formal taking of possession of the added machinery. On the 2d April, 1860, the Holyrods served Taylor with a demand for payment of the 5000£ and interest, and no payment being made, they, on the 30th April, took possession of the machinery, and advertised it for sale by auction on the 21st May following.

On the 13th April, 1860, Emil Preller sued out a writ of scire facias against Taylor for the sum of 155£ 18s. 4d., damages and costs, which was executed on the following day by James Davis, an officer of Mr. Garth Marshall, then high sheriff of

York. On the 10th May, 1860, a similar writ, for 138£ 3s. 3d. was executed by Davis, and on the 25th May, 1860, the property was sold by the sheriff. Notice was given to the sheriff of the bill of sale executed in favor of the Holroyds. The only part of the machinery claimed by the execution creditors consisted of those things which had been purchased by Taylor since the date of the bill of sale.

THE LORD CHANCELLOR (Lord Westbury), after stating the facts of the case, said: My Lords, the question is, whether as to the machinery added and substituted since the date of the mortgage the title of the mortgagees, or that of the judgment creditor, ought to prevail. It is admitted that the judgment creditor has no title as to the machinery originally comprised in the bill of sale; but it is contended that the mortgagees had no specific estate or interest in the future machinery. It is also admitted that if the mortgagees had an equitable estate in the added machinery, the same could not be taken in execution by the judgment creditor.

The question may be easily decided by the application of a few elementary principles long settled in Courts of equity. In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a Court of equity will decree specific performance. In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee; subject, of course, to the contract being one to be specifically performed. And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a Court of equity would direct to be specifically performed.

A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity

for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person.

There can be no doubt, therefore, that if the mortgage deed in the present case had contained nothing but the contract which is involved in the aforesaid covenant of Taylor, the mortgagor, such contract would have amounted to a valid assignment in equity of the whole of the machinery and chattels in question, supposing such machinery and effects to have been in existence and upon the mill at the time of the execution of the deed.

But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and fixed and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation merely because there is nothing to transfer.

But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained.

Apply these familiar principles to the present case; it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees, to whom Taylor

was bound to make a legal conveyance, and for whom he, in the meantime, was a trustee of the property in question.

There is another criterion to prove that the mortgagee acquired an estate or interest in the added machinery as soon as it was brought into the mill. If afterwards the mortgagor had attempted to remove any part of such machinery, except for the purpose of substitution, the mortgagee would have been entitled to an injunction to restrain such removal, and that because of his estate in the specific property. The result is, that the title of the appellants is to be preferred to that of the judgment creditor.

The Obligation Secured.

COOK v. BARTHOLOMEW.

60 Conn. 24. 1891.

CARPENTER, J. This is a suit for the foreclosure of a mortgage, with the alleged mortgage annexed as an exhibit. The mortgage is in two parts—an ordinary deed for the consideration of $900, duly executed to convey real estate, and a condition thereto attached, of the same date, and signed by the grantor, as follows: "The said Bostwick, for the consideration named in the within deed, covenants and agrees with said Charles Cook as such conservator, that he will receive said Sarah A. Bostwick into his care and keeping during the term of her natural life, that he will provide for all her wants in a reasonable and proper way, will provide her with all needed food, drink and clothing, have a room and fire when needed, lodging and every necessary comfort, both in sickness and health, and at her decease give her decent and proper burial, and erect tombstones at her grave with a suitable inscription thereon, within one year after her decease, said tombstone to be of a value of not less than fourteen dollars. Now, therefore, if said Bostwick shall well and truly perform all and every of the above covenants and stipulations faithfully, then this deed to be void, otherwise to remain in full force and effect in law."

The complainant also alleges that the defendant, Bostwick, subsequently conveyed his interest in the premises to the defendant, Jones, and that Jones conveyed his interest to the

other defendant, Bartholomew. The defendants demurred, and the case is reserved.

Whether the instrument sued on is or is not a mortgage is the principal question in the case. What is a mortgage? "A mortgage is a contract of sale executed, with power to redeem. * * * The condition of a mortgage may be the payment of a debt, the indemnity of a surety, or the doing or not doing any other act. The most common method is to insert the condition in the deed, but it may as well be done by a separate instrument of defeasance executed at the same time. * * * A bond or note is usually taken for the debt, which is described in the deed, with a condition that if the debt is paid by the time the deed shall be void. In such case the mortgage is called a collateral security for the debt. In like manner an engagement to indemnify, or any other agreement, may be described in the mortgage deed." 2 Swift's Digest, 182, 183. "To constitute a mortgage the conveyance must be made to secure the payment of a debt." Bacon v. Brown, 19 Conn. 29. "A conveyance of lands by a debtor to a creditor as a security for the payment of the debt." Jarvis v. Woodruff, 22 Conn. 548.

What is a debt? "That which is due from one person to another, whether money, goods or services; that which one person is bound to pay to another or to perform for his benefit; that of which payment is liable to be exacted; due; obligation; liability." Webster's Dictionary.

What is this case? Ammon Bostwick received $900 from the plaintiff, in consideration of which he agreed to support Sarah A. Bostwick during life, and at her death to bury her and to erect a tombstone to her memory. To secure the performance of this agreement he executed this deed, with a condition that the deed should be void if the agreement should be performed. He assumed a duty which may be aptly described as a debt. He executed a deed of real estate as collateral security for the performance of that duty—the payment of that debt. The obligation falls within an approved definition of debt, and the conveyance is within the legal definition of a mortgage.

There is no force in the objection that this cannot be a mortgage because of the difficulty in ascertaining the amount of the debt, as clearly appears by the definitions. Of course there is less certainty and more inconvenience in reducing an obligation

of this nature to a money valuation than there is in computing the amount due on an ordinary bond or note. Nevertheless it may be approximately done; and this is sufficient for all the purposes of substantial justice. Courts never refuse to redress an injury on account of the difficulty in estimating the extent of the injury in dollars and cents.

In this case the age, health, general condition and expectation of life of Sarah A. Bostwick must be known; add to these the probable cost of supporting her for one year, and we have the data for a reasonable estimate of the cost of supporting her through life. It is a problem of the same nature, containing the same elements and similar factors, with the problem which the parties solved fourteen years ago. They then, as it seems, fixed the outside limit at $900. The same thing can be done now as well as then. Possibly $900 may be considered an equitable limit beyond which the plaintiff may not claim in this case. As other circumstances may exist which will materially affect the general question we will not consider the question further on this demurrer.

Regarding the conveyance as a mortgage, as we do, there is no foundation for the claim that an entry for a breach of the condition is essential. An entry is essential when the grantor would divest the grantee of his title for a breach of a condition. This is an action by the grantee, in whom the title is, not to enforce a forfeiture, but to foreclose an equity of redemption, unless the grantor, within a reasonable time allowed him therefor, pays the damage sustained by a breach of his agreement.

The Court of Common Pleas is advised to overrule the demurrer.

PART II

THE MORTGAGE INTERESTS

CHAPTER VII.

ESTATE OR INTEREST OF THE MORTGAGEE.

Possession.

WALES v. MELLEN.

1 Gray 512 (Mass.). 1854.

[The plaintiff seeks by writ of entry to obtain possession of the mortgaged premises, before breach of condition by the mortgagor. The mortgage had no express provision on the question of possession. But the condition was that the mortgagor should support the mortgagee.]

METCALF, J. There is no doubt that by our law a mortgagee may take possession and eject the mortgagor before condition broken, unless there is an agreement between them to the contrary. Newall v Wright, 3 Mass. 155; Rev. Sts. c. 107, § 9. Such is also the law of New Hampshire and Maine. But an agreement by the mortgagee, that the mortgagor may remain in possession until condition broken, need not be expressly set forth in the mortgage, nor in any other writing. Whenever it appears by necessary implication from the terms of the condition of the mortgage, that it must have been the understanding of the parties that the mortgagor should retain possession, the mortgagee can neither enter and expel the mortgagor, nor maintain a writ of entry against him, before condition broken or waste committed. Hartshorn v. Hubbard, 2 N. H. 453; Flanders v. Lamphear, 9 N. H. 201; Rhoades v. Parker, 10 N. H. 83; Lamb v. Foss, 21 Maine, 240; Clay v. Wren, 34 Maine, 187. In the case now before us, it is set forth, in the preamble to the condition of the mortgage, that the said Hannah had conveyed the

demanded premises to the said Nathaniel K. "for her future maintenance and support," and that the said Nathaniel K. had, "at the same time, reconveyed the same premises to said Hannah, as security for such maintenance and support." Then follows the condition, that the tenant shall maintain the demandant, in sickness and in health, by providing all things necessary for her comfort and support, and at her decease give her a decent burial. We are of opinion, upon the reason of the matter, as well as upon the decisions above cited, that it is a necessary implication from the terms of this preamble and condition, that the tenant should retain possession of the demanded premises while he should perform, from time to time, the acts, the performance of which the mortgage was intended to secure. By taking the demanded premises from him, the demandant would probably prevent him from carrying into effect the purpose for which alone the mortgage is expressed to be made. * * *

Demandant nonsuit.

Mortgagee's Use of Property.

CURTISS v. SHELDON.

91 Mich. 390, 51 N. W. 1057. 1892.

GRANT, J. Complainants filed a bill to redeem. Decree was entered for them, and defendant appealed to this court, which affirmed the decree below. Curtiss v. Sheldon, 47 Mich. 262, 11 N. W. Rep. 151. The case was remanded for an accounting, and complainants now appeal from the decree fixing the amount due to the defendant. The accounting was in exact accord with the first decree, which was affirmed by this court. Complainants now attack this decree on two grounds, viz.: (1) Because it allows the defendant 10 per cent. on his loans to them; and (2) because it held defendant accountable for the rents actually received, instead of the rents which they insist defendant might have received.

1. The rate of interest was fixed by the parties, and 10 per cent. was at that time a legal and very common rate of interest. Courts possess no power, legal or equitable, to change the terms of contracts. No claim is made that there was any misrepresentation or fraud in fixing the rate of interest.

2. The property was occupied as an hotel, and it is insisted that the defendant might have realized a greater rent if he had permitted the lessee to keep a bar for the sale of liquors. Prior to 1875 the sale of liquors in this state was unlawful, and defendant clearly could not be held for refusing to permit the property to be used for an unlawful purpose. Since 1875 the sale of liquor has been lawful under very stringent regulations. Undoubtedly buildings can be rented for saloon purposes in many localities at higher rents than for other kinds of business. Non sequitur that the law imposed a duty upon Mr. Sheldon to lease the property for that purpose.

3. The decree in this case limits the amount due from complainants to the sums actually advanced, and to the cost of the improvements, taxes, and insurance. From this amount is deducted the amounts actually received by Mr. Sheldon for rents. After the execution of the deed to him, he believed that he owned the property. It was clearly to his advantage to realize all he could from the use of the property. The record shows, in my judgment, that he acted in good faith in renting the property, and exercised ordinary care and prudence in that regard. It is immaterial whether he was a mortgagee, trustee, or agent of the complainants. He was in possession by their consent, under a deed from them. At the time this deed was executed, complainants and Mr. Sheldon made a written agreement, by which he agreed to use reasonable diligence to sell the property within one year at a price that should be concurred in by both parties, pay himself the sums mentioned in the agreement, with interest at 10 per cent per annum, and pay the surplus to complainants. This agreement was at the time deposited with a third party, and appears to have been forgotten until the accounting before the commissioner, when it was produced by the party with whom it had been left. It is material to mention it here only to show the relations of the parties and the conditions under which Mr. Sheldon accepted the deed. Mr. Curtiss, who is the assignee of Martin Mosher, by his own evidence relieves Mr. Sheldon from any charge of fraud or willful neglect. When questioned as to the reason why Mr. Sheldon could not get as much for the premises as he (the witness) could get, he replied, "Because he did not know how to do it." He also testified that he had not informed him that any person would give a larger rent.

It is unnecessary to discuss the question of fraud charged by the complainants against Mr. Sheldon, claiming that, in the settlements at and prior to 1872, he represented the amounts due from complainants to be larger than they actually were. By the former decree, these settlements were set aside, and the complainants allowed to redeem upon the basis of the original amounts. The decree is affirmed. Defendant will recover costs in this court, and complainants will recover the costs in the court below. The other justices concurred.

Disbursements by Mortgagee.

JOHNSON v. HOSFORD.

110 Ind. 572, 10 N. E. 407. 1887.

ELLIOTT, C. J. * * * The facts stated by the court are substantially these: On the thirteenth day of March, 1874, Clark Tuttle and wife executed to the Atlas Insurance Company, a mortgage on 60 acres of land to secure the sum of $5,000. The mortgagors agreed to pay 5 per cent. attorney's fees in case suit should be instituted to collect the debt, and to keep the mill situated on the land insured for $5,000 for the benefit of the mortgagee. The mortgage was foreclosed, the property sold, and purchased by the appellee, Hosford. He paid the full amount of the decree, including $212 attorney's fees, and $325 for insurance premiums paid by the mortgagee. During the year of redemption, possession of the property was given Hosford, and he was in possession from June 26, 1875, until May 25, 1876. No rents were received by him, and the property had no rental value. The attorney's fees and insurance premium referred to were paid by the mortgagee prior to the sale. While Hosford was in possession he insured the property and paid $230 on premiums. It was necessary to procure the services of a watchman for the protection of the property. Hosford procured one, and paid him $129 for his services. Hosford also paid $400 for necessary repairs to the property. The interest on premiums paid by Hosford is $105.80; on attorney's fees, $184; on the amount paid for repairs, $184; on the amount paid to watchman, $59. After the execution of the mortgage to the Atlas Insurance Company, Tuttle and wife mortgaged the property to Johnson

and Finch. This mortgage was foreclosed, and the property sold to the mortgagees. Before the year for redemption under the first mortgage had expired, Johnson and Finch commenced this suit for the redemption of the property. They paid the principal and interest of the judgment rendered on the foreclosure suit of the Atlas Insurance Company, but have not paid any part of the attorney's fees, the insurance premiums, the amount paid for a watchman, or the amount paid for repairs. The conclusion of law is that these amounts, with interest, are due to Hosford. The appellants filed exceptions to the conclusions of law stated by the court.

As the appellants were not parties to the foreclosure suit brought by the Atlas Company, their rights are not affected by the decree rendered in that suit, and as to them the mortgage stands as if there had been no attempt to foreclose it. Hosford v. Johnson, supra. Hosford is therefore to be regarded as a mortgagee in possession, and, as such, entitled to the full benefit of all the covenants in the mortgage. We think the covenant gave him a right to recover the money paid by him for insurance, and that this question was settled by the decision on the former appeal. The only question not settled by that decision is as to the money paid for the services of the watchman. We think this was properly allowed. It appears clearly from the special finding that the property was exposed to danger, and that a watchman was necessary to preserve it from destruction. Under such circumstances, the mortgagee in possession was justified in taking measures to insure its safety. * * *

Rights of Mortgagee's Creditors.

PROUT v. ROOT.

116 Mass. 410. 1875.

[Tort against sheriff for the seizure by one of his deputies of certain horses as the property of Ray.]

The plaintiff testified that he sold the horses to Ray on December 30, 1871, and took his promissory note therefor for $330, payable on demand, with interest, and also a mortgage of the horses to secure the payment of said note; that on the day of the sale, Ray took possession of the horses, and they were immedi-

ately surrendered to him by Ray; that the horses remained in his possession some three or four days, when they were attached by Streeter. * * *

COLT, J. A mortgage of personal property transfers the general property, and, in the absence of any agreement to the contrary, the immediate right of possession. The title is subject to a defeasance; but unless it has been divested by a performance of the condition, or by the exercise of the mortgagor's right to redeem, the mortgagee can alone maintain an action against a stranger for its conversion. It differs in this respect from a pledge, where only a special property passes and the general ownership remains in the pledgor. At law, and without statute intervention, the interest of the mortgagor is not liable to be taken on execution, because it is a mere equitable interest, and where there is no legal right there can be no legal remedy. Badlam v. Tucker, 1 Pick. 389, 399.

The precise question here presented is, whether the interest of a mortgagee of personal property in his possession, after breach of condition and before foreclosure, is liable to be so taken. We are referred to no case in which the point has been distinctly passed upon by this court. In the decision of it, regard must be had to existing legislation, and to the course of adjudication with reference to similar rights of property.

There is no substantial difference, at common law, in respect to the nature of the title between a mortgage of real and a mortgage of personal property. In both the title vests in the mortgagee subject to be defeated by the performance of the condition. In both, upon a breach of condition, the interest becomes absolute at law; and yet it was held in the case of Blanchard v. Colburn, 16 Mass. 345, that land mortgaged could not be levied on for the debt of the mortgagee unless he had first entered upon the same; for it was said, although to some extent the mortgagee is seized of the estate in fee simple, defeasible only by the performance of the condition or by redemption, yet within the meaning of the statutes which provide for the levy of executions, the land is treated as belonging to the mortgagor, liable to be taken in execution as his real estate subject to the mortgage. It was called a pledge for the security of a debt, which, if paid to the assignee of the debt, would discharge the mortgage and

defeat any title acquired by the levy of a creditor of the mortgagee. These and other objections were declared insuperable. And again, in Eaton v. Whiting, 3 Pick. 484, and Marsh v. Austin, 1 Allen, 235, the mortgagee's interest was declared to be in fact but a chose in action, at least until entry to foreclose, and not liable to be levied on for his debts. All right of redeeming mortgaged lands had before these decisions long been subject to be taken on execution for the mortgagor's debt, and the mode of doing so pointed out by the statutes. St. 1783, c. 57, § 2.

The rule thus maintained as to mortgages of real estate applies with equal if not greater force to mortgages of personal property. The general property technically passes, but it passes only as needed for the security intended. It is in the nature of a pledge. If it be for the payment of money, then it is treated but as an incident of the debt. An assignment of the mortgage carries the title to the property, and an assignment of the debt, without the mortgage, by operation of law, carries with it, in the absence of any controlling agreement or waiver of the right, an equitable lien on the property which attaches to it in the possession of the mortgagee, and all claiming title under him, with notice. Eastman v. Foster, 8 Met. 19; New Bedford Institution for Savings v. Fairhaven Bank, 9 Allen, 175. Upon payment or tender to the mortgagee of the debt secured, the title, without further formality, is vested in the mortgagor, and he may maintain replevin for it, or recover damages for its detention. Gen. Sts., c. 151, § 5. But what is more to the point, under our statutes, the mortgagor's interest in the property, so long as his right to redeem remains, is liable, as in the case of real estate, to be attached and taken on execution, as well after as before condition broken, and whether the property be in the possession of the mortgagee or not. Under such an attachment, the property passes into the custody of the sheriff, and there is only left to the mortgagee the right to redeem, after a demand, within a limited time, of the amount due on his mortgage. If this be paid the possession of the attaching officer cannot be interfered with, and the mortgagee's title is ended. Gen. Sts., c. 123, §§ 62-71. The rights thus given by statute are inconsistent with the existence of a similar right at the same time to attach the same property in favor of the creditors of the mortgagee. It is impossible that two

officers should have equal right of possession by virtue of attachments against different parties in favor of different creditors.

The conclusion is, that under our laws, so long at least as the mortgagee's interest in personal property is held by him in good faith only as security,—before it has been, in fact, applied to the satisfaction of his debt by foreclosure or otherwise,—it cannot be attached as his property. Upon this bill of exceptions, it must be taken that the plaintiff's title as mortgagee was held in good faith, with no fraudulent purpose of defeating or delaying creditors. Upon this point we must presume that proper instructions were given, and the verdict is conclusive. Nor is there any question raised as to the true rule of damages to be applied in a case where the mortgagee's interest is applied to the payment of his own debt.

Exceptions overruled.

CHAPTER VIII.

ESTATE OR INTEREST OF THE MORTGAGOR.

Ownership.

ALLEN v. KELLAM

69 Ala. 442. 1881.

[Action by the heirs at law of Kellam to recover possession of a lot of land in Lafayette, Alabama, which plaintiffs had mortgaged to their attorney.]

SOMERVILLE, J. * * * It is no defense to an action of ejectment brought by a mortgagor, against any other person than the mortgagee, that the legal title is in the mortgagee, and the law day of the mortgage has arrived. The mortgagor must be considered as the real and legal owner as against every stranger, and a defendant in ejectment is not permitted to set up an outstanding legal title in a mortgagee with which he does not connect himself. The better and prevailing doctrine is, that a mortgage is a mere security as to third persons, and as to them the mortgagor has such a title as will support ejectment. Duval's Heirs v. McLoskey, 1 Ala. 708; Scott v. Ware, 65 Ala. 174; Wilson v. Troup (2 Cow. 195), 14 Am. Dec. 458, note, p. 474, 1 Jones, Mortg. § 11; Woods v. Hilderbrand (46 Mo. 284), 2 Am. Rep. 513. It was not material, therefore, that the plaintiffs had executed a mortgage on the premises sued for, as the defendant fails to show he was in any manner connected with it. * * *

Ownership and Right to Convey.

MEDLEY v. ELLIOTT.

62 Ill. 532. 1872.

MR. JUSTICE THORNTON. The principal question presented by this record is, are the grantees of a mortgagor protected in their title by possession and payment of taxes,

under the first section of the limitation law of 1839; and is the mortgage thereby barred of foreclosure?

It is the settled law, that in equity a mortgagee has an interest in the premises mortgaged of a personal character similar to the interest which he has in the debt secured. The debt is the principal thing, and the land the incident. The mortgage is only a charge upon the land, and the interest of the mortgagee is a mere chattel interest. Martin v. Mowlin, 2 Burr. 969; Pollock v. Maison, 41 Ill. 516; Runyan v. Mersereau, 11 Johns. 534; Hughes v. Edwards, 9 Wheaton, 489; Eaton v. Whiting, 3 Pick. 484; Wilson v. Troup, 2 Cow. 195.

Chancellor Kent said, in Jackson v. Willard, 4 Johns. 40, "Until foreclosure, or at least until possession taken, the mortgage remains in the light of a chose in action. It is but an incident attached to the debt, and in reason and propriety, it can not, and ought not, to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond."

It naturally follows, that the statute of limitations which bars the debt, the principal, can alone bar the mortgage, the incident. The note secured by the mortgage was not barred for sixteen years after maturity; the possession set up, was only for eleven years. It was held in Pollock v. Maison, supra, that an action of ejectment could be maintained, or a bill of foreclosure filed, or judgment recovered by scire facias, until the statutory bar of the debt was complete. It is also decided in Harris v. Mills, 28 Ill. 44, that when recovery upon the note is barred, the right of foreclosure is also barred. The converse must be equally true.

Besides, the grantee of the mortgagor only succeeded to the estate of the latter. He occupied his position, and took the land subject to the incumbrance of the mortgage. The mortgagor is the owner of the fee until the exercise of the right of entry for condition broken, or until foreclosure. There is a peculiar relation existing between the mortgagor and mortgagee. The former has been termed, while he retained possession, a tenant from year to year, or at sufferance, or a quasi tenant at sufferance, or a tenant at will. 4 Kent, 156; 1 Hill. Mort. 199; Partridge v. Bere, 5 B. & Al. 604.

The mortgagor, while he is permitted to remain in possession, may sell or lease the premises, and under such circumstances cannot be regarded as a trespasser without some act on the part of the mortgagee. Neither is the assignee of the mortgagor a trespasser in possession. He is a purchaser, with constructive notice of the rights of the mortgagee; occupies the same position as his grantor; and is subject to the same equities. Either may be treated as tenant or trespasser, upon forfeiture of the condition of the mortgage, at the pleasure of the mortgagee. Dunn v. Rogers, 43 Ill. 260; 1 Hill, on Mort. 123; 4 Kent Com. 157; Hughes v. Edwards, 9 Wheaton, 489; Doe v. Maisey, 8 B. & Cress. 767.

The grantees of the mortgagor were never treated as trespassers, and their possession was not hostile to, or inconsistent with, the right of the mortgagee. Partridge v. Bere, supra; Hitchman v. Walton, 4 M. & W. 409; Doe v. Barton, 11 Ald. & Ell. 307.

There can be no doubt, that before protection can be afforded, under the limitation law of 1839, the possession must be adverse. It must be hostile in its inception, and so continue. It must be actual, continued, visible, notorious, distinct, and hostile possession. Hawk v. Senseman, 6 Ser. & Rawle, 21; McClellan v. Kellogg, 17 Ill. 503; Cook v. Norton, 48 Ill. 20.

The relation of mortgagor and mortgagee, the fact that the purchaser only succeeded to the rights of the former, and with notice of the incumbrance, and the consequent privity between the parties, forbid the conclusion of an adverse possession. The possession must be regarded as in subordination to the mortgage; and it can not cease to be of that character until there is an open disclaimer of holding under it, and the assertion of a distinct title, with the knowledge of the mortgagee. Brown v. Devine, 61 Ill. 260; Geller's Lessee v. Eckert, 4 How. (U. S.) 289.

As to the payment of taxes, it was the duty of the mortgagor, as well as his grantees, while in possession, to pay the taxes, and no right could be acquired thereby. The mortgagee might well regard such payment as a protection of his interest. Wright v. Langley, 36 Ill. 381.

We are of opinion that the record shows a release of all the mortgaged premises, except the land conveyed to appellants,

and that the mortgage lien rested upon it. The releases were executed prior to the conveyance to appellants.

The heirs of the mortgagor were not necessary parties, as all the premises mortgaged had been sold and conveyed, and therefore, they had no subsisting interest in the land.

Decree affirmed.

Use of Property.

INGELL v. FAY.

112 Mass. 451. 1873.

Contract brought by the plaintiffs as administrators of the estate of Zadoc Ingell, deceased, to recover the price of a quantity of timber sold by the plaintiffs to the defendant. The writ was dated April 17, 1872.

At the trial in the Superior Court, before Allen, J., the delivery of the timber and the price charged, and that the timber was cut by the intestate upon his farm a short time previous to his death, and was lying where it was cut, at the time of his death, were admitted, but the defendant contended that it was the property of one William E. Moore.

There was evidence tending to show that the intestate died January 22, 1871; and that the timber was sold and delivered to the defendant by the plaintiffs in May, or June, 1871.

The defendant put in evidence a mortgage deed from the intestate to Moore of the premises upon which the timber was cut. This mortgage was dated April 1, 1867, and contained the following proviso: "Provided, nevertheless and this deed is on the following condition, that whereas I, the said Zadoc Ingell, have executed one promissory note of hand bearing even date herewith for twenty-three hundred dollars payable in wood to said William E. Moore or order, cut and delivered at the Western Railroad track or depot in Chester, or either place as said Moore or his agent shall elect, within five years from this date, one hundred and fifteen cords each and every year until paid according to the tenor of said note, said Ingell not to cut wood or timber upon said estate, except for the payment of said note, to reduce the value below the amount secured with interest annually: Therefore if I, the said Zadoc Ingell, or my

representatives shall pay the full amount of said note according to the tenor thereof, then this deed shall be void; otherwise in full force." On the back of the mortgage was a duly executed and recorded certificate of two witnesses to prove an entry to foreclose the mortgage for a breach of the condition. Upon the note mentioned in the mortgage deed were several indorsements of wood received in part payment, the last indorsement being dated March 1, 1869. It was admitted that no payments had been made upon the note except those that were indorsed upon it. * * *

The defendant requested the court to instruct the jury that Moore was entitled as mortgagee, under the facts admitted and not in dispute, to the proceeds of the timber, and that the plaintiffs could not maintain the action; and also, if they were satisfied that the value of the mortgaged premises at the commencement of the action was less than the amount of the mortgage debt at that time, they could not maintain the action.

The court declined to give these instructions, but instructed the jury that if the value of the premises, at the time of the sale and delivery to the defendant, was less than the amount of the mortgage debt then due, and if the plaintiffs sold the timber for their own benefit or that of the estate, and not for the benefit of Moore, the plaintiffs could not recover for the value of the timber; but if the value of the premises, at the time of the sale and delivery, was greater than the amount of the mortgage debt at that time, the plaintiffs were entitled to recover the value of the timber. The jury found for the plaintiffs, and the defendant excepted. * * *

AMES, J. By the terms of the mortgage, the intestate had a right to cut wood and timber upon the mortgaged premises whenever he saw fit, and to any extent, subject only to the limitation that he should not at any time so strip the land as to leave it less in value than the amount due at the time upon the mortgage. It is settled by the verdict of the jury that the sale of the timber to the defendants, for which payment is sought in this suit, was not a violation of this condition. This was the only question in the case, and it was submitted to the jury with instructions sufficiently favorable to the defendant. If after the sale and delivery of the timber, the remaining value of

the land exceeded the amount then due upon the mortgage, the mortgagee had no right to claim either the timber or its proceeds.

Exceptions overruled.

Relation to Mortgagee.

MORSE v. STAFFORD.

95 Me. 31, 49 Atl. 45. 1901.

* * * Writ of entry to recover possession of land situate in Hartland, alleged to be in possession of the defendant. * * *

WISWELL, C. J. The only question necessary to a decision of this case is whether the assignee of a mortgage may maintain a real action against a person in possession of the mortgaged premises, and obtain a common-law judgment for possession, without the production of the notes referred to in the mortgage, or other evidence, except the mortgage itself, of the existence of some part of the mortgage indebtedness, where there is no evidence to the contrary, and no circumstances from which a payment of the indebtedness may be inferred.

We have no doubt that such action may be maintained, and such judgment recovered. It would be otherwise if either party that was entitled to do so should ask for a conditional judgment. In that case the plaintiff would be compelled to introduce evidence showing that something, and how much, was due upon the mortgage debt. Blethen v. Dwinal, 35 Me. 556. Or, if there was evidence tending to show that the debt had been fully satisfied, then it would become a question to be determined; and, if the debt should be found to be paid, the holder of the mortgage would not be entitled to judgment for possession. Hadlock v. Bulfinch, 31 Me. 246; Williams v. Thurlow, Id. 392; Day v. Philbrook, 85 Me. 90, 26 Atl. 999. But in all these cases the debt had been paid, as was found by the court, and the question was not involved as to what evidence was necessary to prove either the existence or payment of the debt secured by the mortgage.

Upon the other hand, in Powers v. Patten, 71 Me. 583, this court said: "The mortgage itself is a conveyance of the estate, and the recital of the notes in the condition of the mortgage

is an admission of their existence and of the existence of the debt. For the purpose of establishing the defendant's right of possession, the mortgage alone, without the notes, is admissible as evidence of title and the mortgage debt." In that case the mortgage was relied upon by the defendant in possession, and the court said, referring to the contention that the mortgage, without the production of the notes, was insufficient for the purpose of proving a right to possession: "If the present defendant were in the position of a demandant, and a conditional judgment was demanded by either side entitled to it, in such case she could not recover without producing the notes, or accounting for their nonproduction." * * * These rules are logically deducible from the rights and obligations of the mortgagor and mortgagee, and are supported by the authorities. A mortgagee, or assignee of a mortgage, is not entitled to a conditional judgment as of mortgage, unless he proves in some way the existence of some part of the mortgage debt. If he does not move for such conditional judgment, but the defendant does, and is entitled to do so under Rev. St., c. 90, § 8, then the plaintiff must prove that some part of such debt remains unsatisfied. A mortgagee out of possession is not entitled to a common-law judgment for possession if upon the whole evidence it appears that the debt secured by the mortgage has been fully paid. But, in the absence of all other evidence upon the question of payment, the mortgage itself, without the production of the notes, or any evidence accounting for their nonproduction, is prima facie evidence of the existence of the debt at that time, and is sufficient to entitle the plaintiff to possession of the mortgaged premises and to a common law judgment therefor, when neither party entitled to do so moves for a conditional judgment.

Applying these principles to the facts of this case, the plaintiff is entitled to a judgment for possession of the demanded premises. He introduced in evidence a warranty deed of the premises to one Emery, dated November 20, 1886; a mortgage of the same from Emery, dated October 11, 1893, which mortgage recited an indebtedness of $1,200, represented by six promissory notes; an assignment from the mortgagee to the plaintiff of that mortgage, and the debt thereby secured, written upon the back of the mortgage, and dated November 23, 1899. These instruments are all in due form, and were all properly executed, acknowledged, and

recorded. No evidence whatever was introduced tending to show that the mortgage debt had been paid, and there are no circumstances from which an inference of such payment can be drawn. Neither party moved for a conditional judgment but the case was reported to the law court for that court to order such judgment as the legal rights of the parties required.

The defendant sets up in his brief statement, under the general issue, that he was a tenant of the plaintiff and another, alleged to be joint owners of the property; and it is argued that the tenancy had not been terminated as provided by statute. But no evidence was introduced showing that the relation of landlord and tenant existed, nor does it appear by what right or authority the defendant was in possession. The relation of landlord and tenant may exist between mortgagee and mortgagor, or one claiming under the latter; but this relation is not presumed to exist between such parties, and does not grow out of the relations of mortgagee and mortgagor. If, between such parties, the relation of landlord and tenant does exist, it must be proved.

* * *

Judgment for plaintiff for possession.

Property Subject to Execution.

BODWELL GRANITE CO. v. LANE.

83 Me. 168, 21 Atl. 829. 1891.

EMERY, J. Writ of entry. Eliminating the immaterial matters, the story is this: The defendant at one time owned the demanded premises in fee. In 1873, he mortgaged them to his mother, Rebecca C. Lane, to secure her maintenance during life, by him, or his heirs, executors, or administrators. There was no provision in this mortgage that his assigns might perform the condition. In 1881 he again mortgaged them to one Kittredge. In 1884, the plaintiff attached all the defendant's real estate by a general attachment in a suit against him, and, having recovered judgment in that suit, the plaintiff, in 1888, made a sale upon the execution of "all the right in equity which * * * (the defendant had at the time of the attachment) * * * to redeem the following described mortgaged real estate," (describing the demanded premises). The plaintiff

was the purchaser, and received a sheriff's deed of said equity of redemption. The regularity of these proceedings is not questioned. Rebecca C. Lane, the first mortgagee, died in 1888, before the sale. In 1889 the plaintiff brought this writ of entry against the defendant.

1. The defendant contends that, at the time, he had no equity of redemption which could be attached or sold. He claims that after his mortgage to his mother, Rebecca, for her maintenance, his remaining interest could not be conveyed by him, nor attached by his creditors, without Rebecca's consent, which does not appear to have been given. He says for that reason his mortgage to Kittredge in 1881 was invalid, and the attachment in 1884 was ineffectual. He further says that Rebecca's death, before the execution sale, discharged her mortgage, and left the fee in him, which might have been taken by a sale of the fee, but not by a sale of an equity of redemption.

His argument is briefly this: The condition in his mortgage to Rebecca could only be performed by himself, or his heirs or executors. Rebecca, the first mortgagee, was entitled to his personal care, and could not be assigned to the care of any other person. Hence the right to perform the condition could not be assigned or conveyed by him, and—as a conveyance by a mortgagor is in effect only a conveyance of a right to perform the condition in the mortgage—any attempt by him to so convey must be ineffectual and can vest no interest in his grantee.

But, after his mortgage to Rebecca for her maintenance, the defendant still had an actual interest in the mortgaged land. He owned it in fee, subject to Rebecca's mortgage. If he could not assign or convey any right to perform the condition in the mortgage, he could divest himself of all his interest in the land. That interest was his own, to be disposed of as he saw fit. His grantee might not have acquired the right to perform the condition, but he acquired the land subject to the condition. If the condition should never be performed by the mortgagor, his grantee might lose the land. If the condition should be performed, the grantee of the mortgagor would hold the land free of the condition. We think, therefore, that the defendant's deed to Kittredge, in 1881, did mortgage the premises to him in fee subject to Rebecca's mortgage. When Rebecca's death discharged her mortgage, Kittredge then held a valid mortgage,

relieved of the prior incumbrance. The defendant then had a right of redemption from the Kittredge mortgage, and had nothing more. This right of redemption became vested in the plaintiff by the execution sale of such right, and is sufficient to maintain a writ of entry against the defendant. Hoyt v. Bradley, 27 Me. 242; Bryant v. Erskine, 55 Me. 153; Bartlett v. Stearns, 73 Me. 22.

We think none of the cases cited by the defendant's counsel will be found, upon examination, to conflict with the above proposition. * * *

CHAPTER IX.

ASSIGNMENT OF THE MORTGAGE.

What is a Valid Assignment.

JOHNSON v. BEARD.

93 Ala. 96, 9 So. 535. 1891.

Statutory real action by John M. Beard against N. G. Johnson. Judgment for plaintiff. Defendant appeals. Affirmed. On October 28, 1884, the defendant Johnson, executed a note secured by mortgage to one J. C. Henderson, which was made payable October 1, 1885. On July 28, 1885, Henderson transferred the said note and mortgage to the firm of Beard, Wright & Hamel, by indorsing upon the said mortgage the following written transfer: "For value received I hereby transfer the within mortgage to Beard, Wright & Hamel, with all rights and powers contained herein, without recourse. (Signed) J. C. Henderson." On February 8, 1887, the said Beard, Wright & Hamel transferred the said mortgage to one W. R. Copeland, which transfer was evidenced by the following indorsement on the mortgage: "For value received we hereby transfer to W. R. Copeland all our rights and powers and title in and to the within mortgage and note. (Signed) Beard, Wright & Hamel." The last assignee, Copeland, after duly posting notices at the courthouse and two other public places in said county, sold the land described in the mortgage, under the power contained therein, at public outcry, at the courthouse door, and the plaintiff in this suit, J. M. Beard, who was the highest and best bidder, became the purchaser; and on August 30, 1887, said Copeland executed to him the deed to the said land. Code Ala., § 1844, provides that, "where power to sell land is given to the grantee in any mortgage, * * * the power is part of the security, and may be executed by any person, * * * who, by assignment or otherwise, becomes entitled to the money secured." * * *

COLEMAN, J. This was an action in ejectment by Beard

against appellant. Plaintiff in ejectment suit claimed title under a deed executed to him by the assignee of a mortgage, who foreclosed the mortgage under a power of sale contained in it. Appellant, defendant in the ejectment suit, was the mortgagor. The grounds of defense were—first, that the transfer of the mortgage to the assignee contained no apt words of conveyance, so as to carry the legal title; and, second, that the transfer of the mortgage to the assignee was without consideration, and made to defraud the creditors of the mortgagor. Code, § 1844, which provides that the assignee of a mortgage, in which is given the grantee the power to sell, may execute the mortgage, notwithstanding the assignment may not contain apt words to convey the legal title, has been so often construed by this court we deem it unnecessary to more than simply cite some of the cases. Martinez v. Lindsay, (Ala.) 8 South. Rep. 787; Widsmith v. Tracy, 80 Ala. 263; Buell v. Underwood, 65 Ala. 285; McGuire v. Van Pelt, 55 Ala. 344. In the case of Sanders v. Cassady, 86 Ala. 246, 5 South. Rep. 503, the auctioneer who sold the land at public auction, for the assignee of the mortgage, made the deeds in his own name to the purchaser. As a matter of course, not being the transferee of the mortgage, and having no title in himself otherwise, he could convey none. The cases are wholly unlike. Conveyances made with the intent to hinder, delay, and defraud creditors are valid and binding between the parties and their privies, and, as to them, have the same operation and effect as if founded on a valuable consideration, untainted with a covinous intent. 3 Brick. Dig. p. 514 § 105. The defendant was a mortgagor, a debtor instead of being a creditor of the mortgagee, and, as such, had no right to impeach the validity of the assignment made by his mortgagee, or to inquire into the consideration passing between the mortgagee and his assignee. There was no error in excluding the testimony offered to prove these facts.

Assignment of the Debt.

BARRETT v. HINKLEY.

124 Ill. 32, 14 N. E. 863. 1888.

MULKEY, J. Watson S. Hinkley, claiming to be the owner in fee of the land in controversy, on the twenty-sixth day of

February, 1885, brought an action of ejectment in the superior court of Cook county against the appellants, George D. Barrett, Adalina S. Barrett, William H. Whitehead, and others, to recover the possession thereof. There was a trial of the cause before the court without a jury, resulting in a finding and judgment for the plaintiff, and the defendants appealed. The evidence tends to show the following state of facts: In 1870, Thomas Kearns was in possession of the land, claiming to own it in fee-simple. On August 3d of that year he sold and conveyed it to William H. W. Cushman for the sum of $80,000. Cushman gave his four notes to Kearns for balance of purchase money,—one for $12,500, maturing in 30 days; three for $16,875 each, maturing, respectively, in two, three, and four years after date,—and all secured by a mortgage on the premises. The notes seem to have all been paid but the last one. In 1878, Kearns died, and his widow, Alice Kearns, administered on his estate. Previous to his death, however, he had hypothecated the mortgage and last note to secure a loan from Greenebaum. Subsequently, and before the commencement of the present suit, Greenebaum, in his own right, and Mrs. Kearns, as administratrix of her husband, for value, sold and assigned by a separate instrument in writing the mortgage and note to the appellee, Watson S. Hinkley. This is in substance the case made by plaintiff. The defendants showed no title in themselves or any one else. The conclusion to be reached, therefore, depends upon whether the case made by the plaintiff warranted the court below in rendering the judgment it did. * * *

It is first to be specially noted that this is a suit at law, as contra-distinguished from a suit in equity. It is brought to enforce a naked legal right, as distinguished from an equitable right. The plaintiff seeks to recover certain lands, the title whereof he claims in fee-simple. To do this he is bound to show in himself a fee-simple title at law, as contradistinguished from an equitable fee. Fischer v. Eslaman, 68 Ill. 78; Wales v. Bogue, 31 Ill. 464; Fleming v. Carter, 7 Ill. 286; Dawson v. Hayden, 67 Ill. 52. Has he done this? He attempts to derive title remotely through the mortgage from Cushman to Kearns, but upon what legal theory is not very readily perceived. His immediate source of title, however, seems to be Mrs. Kearns, as administratrix of her husband, and Greenebaum, as pledgee

of the note and mortgage. The instrument through which he claims is lost or destroyed, and all we know concerning its character is what the plaintiff himself says about it. As to its contents, he does not pretend to state a single sentence or word in it, but characterizes it as an assignment, and gives the conclusions which he draws from it in general terms only. After stating his purchase of the note and mortgage in January, 1880, he says: "The assignment was from Mrs. Kearns, the administratrix of Thomas Kearns' estate, and Elias Greenebaum, the banker. At the time of the purchase, a separate writing was given to me,—a full assignment. * * * It was a very explicit assignment, or full assignment, of the note and mortgage, and the land, the property, and all the right and title to the land." It will be observed, the instrument is throughout characterized as an assignment only, which does not, like the term "deed" or specialty, signify an instrument under seal. A mere written assignment, founded upon a valuable consideration, is just as available for the purpose of passing to the assignee the equitable title to land as an instrument under seal. Such being the case, we would clearly not be warranted in inferring that the assignment was under seal, from the simple fact that the witness gives it as his opinion that the instrument was "a full assignment" of the land, which is nothing more than the witness' opinion upon a question of law. There not being sufficient evidence in the record to show that the assignment was under seal, it follows that, even conceding the legal title to the property to have been in Mrs. Kearns and Greenebaum, or either of them, it could not have passed to the appellee by that instrument, and, if not by it, not at all, because that is the only muniment of title relied on for that purpose. This conclusion is of course based upon the fundamental principle that an instrument inter partes, in order to pass the legal title to real property, must be under seal. But this is not all. Even conceding the sufficiency of the assignment to pass the legal title, the record, in our opinion, fails to show that the assignors, or either of them, had such title; hence there was nothing for the assignment to operate upon, so far as the legal estate in the land is concerned. Having no such title, they could not convey it. That the legal estate in this property was not either in Greenebaum or Mrs. Kearns at the time of the assignment to plaintiff is demonstrable

by the plainest principles of law. Let us see. Thomas Kearns was the owner of this property in fee. He conveyed it in fee to Cushman. The latter, as a part of the same transaction, reconveyed it by way of mortgage to Kearns. By reason of this last conveyance, Kearns became mortgagee of the property, and Cushman mortgagor. According to the English doctrine, and that of some of the states of the Union, including our own, Kearns, at least as between the parties, took the legal estate, and Cushman the equitable. According to other authorities, Kearns, by virtue of Cushman's mortgage to him, took merely a lien upon the property to secure the mortgage indebtedness, and the legal title remained in Cushman. For the purposes of the present inquiry, it is not important to consider just now, if at all, which is the better or true theory. It is manifest, and must be conceded, that the legal estate in the land, after the execution of the mortgage, was either in the mortgagee or mortgagor, or in both combined. Such being the case, it is equally clear, appellee, to succeed, must have deduced title through one or both of these parties. This could only have been done by showing that the legal title had, by means of some of the legally recognized modes of conveying real property, passed from one or both of them to himself. This he did not do, or attempt to do; indeed, he does not claim through them, nor either of them. Not only so; neither Mrs. Kearns nor Greenebaum, through whom appellee does claim, derives title through any deed or conveyance executed by either the mortgagor or mortgagee; nor does either of them claim as heir or devisee of the mortgagor or mortgagee.

As the assignment of the note and mortgage to appellee did not, as we hold, transfer or otherwise affect the legal title to the land, it may be asked what effect, then, did it have? This question, like most others pertaining to the law of mortgages, admits of two answers, depending upon whether the rules and principles which prevail in courts of equity or of law are to be applied. If the latter, we would say none; because, as to the note, that could not be assigned by a separate instrument, as was done in this case, so as to pass the legal title. Ryan v. May, 14 Ill. 49; Fortier v. Darst, 31 Ill. 213; Chickering v. Raymond, 15 Ill. 362. As to the mortgage, it is well settled, that could not be assigned like negotiable paper, so as to pass

the legal title in the instrument, or clothe the assignee with the immunity of an innocent holder, except under certain circumstances which do not apply here. Railway Co. v. Loewenthal, 93 Ill. 433; Hamilton v. Lubukee, 51 Ill. 415; Olds v. Cummings, 31 Ill. 188; McIntire v. Yates, 104 Ill. 491; Fortier v. Darst, 31 Ill. 212. But that the mortgagee, or any one succeeding to his title might, by deed in the form of an assignment, pass to the assignee the legal as well as the equitable interest of the mortgagee, we have no doubt, though there is some conflict on this subject. 2 Washb. Real Prop. 115, and authorities there cited. Yet the assignors, in the case in hand, not having the legal title, as we have just seen could not, by any form of instrument, transmit it to another. If, however, the rules and principles which obtain in courts of equity are to be applied, we would say that, by virtue of the assignment, the appellee became the equitable owner of the note and mortgage, and that it gave him such an interest or equity respecting the land as entitled him to have it sold in satisfaction of the debt. * * *

CHAPTER X.

TRANSFER BY THE MORTGAGOR.

Liabilities of Mortgagor After Transfer.

ANTHONY INVESTMENT CO. v. LAW.

62 Kan. 193, 61 Pac. 745. 1900.

(Action on four interest coupon notes, secured by a mortgage on land. The defendant sold the land to one Kensley who assumed the indebtedness.)

JOHNSTON, J. * * * One contention is that, the makers having sold the land subject to the mortgage debt, no action could be maintained against them for a personal judgment before the foreclosure of the mortgage securing the notes. The debt represented by the notes is the primary obligation, and the mortgage a mere security for its payment. The holder of a note may, at his option, ignore the security, and bring his action on the note alone, and the fact that the mortgagor has sold the mortgaged property to another, subject to the mortgage debt, does not affect the right of the holder to pursue the personal remedy. Lichty v. McMartin, 11 Kan. 565; Jones, Mortg. 1220. The fact that the purchaser of the property assumed the mortgage debt does not affect the personal liability of the makers of the notes, unless there has been an agreement to release them; and no release is claimed. * * *

Liabilities of Transferee.

PATCH v. LORING.

17 Pick. 336 (Mass.). 1836.

Assumpsit. The declaration contained counts for use and occupation, and for money had and received, and laid out and expended. * * *

To support the first count, the plaintiff introduced a mortgage

deed from Dana Sherman to the plaintiff, dated November 23, 1830, conveying to him a building situated on the defendant's land, which Sherman was then erecting for the purpose of rolling sheet lead, together with the flume and water wheels, to secure the payment of the sum of $200 with interest in six months, according to the tenor of Sherman's note to the plaintiff of the same date. It was stipulated in the deed, that Sherman should have the use and occupation of the building for the term of one year. On the same or next day, the agent of the plaintiff entered the building and the mortgaged property was formally delivered to him by Sherman. Sherman continued to occupy the building according to the stipulation in the mortgage deed, till July 1, 1831, when he left it, and the defendant took possession of the mortgaged property; and the defendant had retained possession thereof ever since.

The defendant introduced a mortgage deed of the same property from Sherman to him, of the same date with the mortgage to the plaintiff. It was proved, however, that it was made subsequently to the mortgage to the plaintiff; and that it was agreed between Sherman and the defendant, that the plaintiff's deed should have precedence. The defendant also introduced in evidence another mortgage from Sherman to him, dated February 23, 1831, of the same and other property, and a release thereof from Sherman to him, dated June 22, 1831.

The amount of the plaintiff's claim was deducted from the estimated value of the property paid by the defendant to Sherman. * * *

SHAW, C. J. It appears to us quite impossible to maintain this action for use and occupation. The evidence does not show, that the relation of landlord and tenant ever subsisted between the plaintiff and the defendant. There was certainly no express agreement of hiring and letting, and the case does not disclose facts from which such agreement can be implied. The plaintiff took a mortgage of Sherman, on a certain building, erected upon the land of the defendant, as of personal property, before the statute upon the subject of mortgages of personal estate. This was accompanied with a stipulation, that the mortgagee should remain in possession for one year. Subsequently on the same day, Sherman the owner made another mortgage,

on the same building, to the defendant, and afterwards included the same with personal property in a second mortgage to the defendant; and still later, for a valuable consideration, the defendant took a release and conveyance of the whole property to himself. It does not appear, that after the time limited in the original mortgage, during which Sherman was to remain in possession by the terms of the mortgage, the plaintiff ever entered upon the building, either for the purpose of using it on the defendant's land, or of removing it, if he had a right to do either. It is impossible from these facts to raise an implied promise, on the part of the defendant, to pay the plaintiff for the use of this building. In truth, the building as well as the land were his own, subject only to a mortgage to the plaintiff. It would seem difficult to extend this right, beyond that of removing the building from the defendant's soil.

The claim for money had and received is probably founded in the supposed agreement, arising from the arrangements between Sherman and the defendant, that he, the defendant, would pay the plaintiff the amount of the debt secured by this mortgage. Whether in point of law here was such constructive priority as would be sufficient to maintain assumpsit, and whether, if the facts were proved, they would maintain the action, on the second count, we think there is no occasion to consider, because there is no evidence to establish the fact. The evidence is full, that the conveyance was taken by the defendant, subject to the plaintiff's mortgage, and that the amount of the plaintiff's debt was deducted from the estimated value of the estate as paid by the defendant to Sherman. If therefore Sherman had been compelled to pay his note to the plaintiff, on the personal security, the defendant, in virtue of his agreement, would probably be bound to reimburse and indemnify him. But there seems to be nowhere in these proceedings any promise or undertaking on the part of the defendant, to pay the plaintiff. The debt of the plaintiff is only alluded to, as constituting a charge or lien upon the property conveyed to the defendant, thereby pro tanto diminishing its value. We are therefore of opinion, that the action cannot be maintained upon either count, and that judgment must be entered on the non-suit.

Transfer to Mortgagee.

DELANCEY v. FINNEGAN.

86 Minn. 255, 90 N. W. 387. 1902.

START, C. J. * * * The contention of the plaintiff is, in effect, that the husband's equity of redemption in the land was never extinguished, and that the deed of the land from him and his wife to the insurance company, the mortgagee, was but a change in the form of the security for the payment of its debt, and that the case falls within the doctrine, "Once a mortgage always a mortgage." This precept, however, has no application to a future contract between the mortgagor and mortgagee for the purchase of the mortgagor's right of redemption. The mortgagee may always purchase from the mortgagor his right of redemption, for a fair consideration, if the transaction is untainted by any oppression or advantage taken by the mortgagee of the necessities of the mortgagor. Equity will scan sales of the equity of redemption with jealous care, and require their fairness to be clearly established. Niggeler v. Maurin, 34 Minn. 118, 24 N. W. 369; Marshall v. Thompson, 39 Minn. 137, 39 N. W. 309; Bradbury v. Davenport, 114 Cal. 593, 46 Pac. 1062, 55 Am. St. Rep. 105, and notes. Now it is obvious from the documentary evidence herein that the mortgagee in this case did purchase the mortgagor's equity of redemption in the land, and that the deed, lease, and option to purchase the land were intended to effect such purchase and sale, and were so understood by all the parties thereto. Was the contract of purchase for a fair consideration, and free from any oppression or advantage taken by the mortgagee of the necessities of the mortgagor? This question must be considered from the view point of the facts as they existed at that time, and not as they were five years later, when prosperity had come to brighten and bless, and the land had materially increased in value. At the time of the sale of the equity of redemption the principal of the mortgage was more than a year past due. No interest had been paid for four years, no taxes for seven years, and the land was worth no more than the liens upon it. The mortgagee had the right, legally and ethically, to foreclose its mortgage, and was about to do so. All there was in the land for the mortgagors was what

they might realize from cropping it during the year allowed for redemption. There was also left to them the possibility that if the crop proved to be bountiful and they obtained a good price therefor, they might be able, from the proceeds of the crop and what they could borrow on the land, to redeem from the insurance company's foreclosure sale. But a foreclosure would only add to their burdens. The contract for the purchase of the equity of redemption secured to the mortgagors a cancellation of their debt, and a surrender of the notes evidencing it, the free use of the land for the then coming cropping season, and the option to purchase the land, at any time before the expiration of the lease, for just the amount the insurance company had invested in the land, without any obligation on their part to make such purchase. In short, the contract secured to the mortgagors all the rights and equities they would have had if the sale had not been made and the mortgage had been foreclosed, and more. The sale was for a fair consideration, and was untainted by any oppression or advantage taken of the necessities of the mortgagors.

CHAPTER XI.

ADMINISTRATION OF ESTATES.

On the Death of the Mortgagor.

PLIMPTON v. FULLER.

11 Allen 139 (Mass.). 1865.

Bill in equity in the nature of a bill of interpleader, by the executors of the will of Francis W. Fuller, setting forth a copy of the testator's will, which contained the following devise:

"I give, bequeath and devise to my father, Warren Fuller, and to my mother, Eliza B. Fuller, their heirs and assigns, all the right, title, and interest which I own in the homestead now occupied by my said father, Warren Fuller, excepting that my aunts, Eliza Fuller and Hannah Fuller, are to have free and undisturbed possession of the old house, with all the privileges they have heretofore had, except that of cutting off wood."

The will also contained various devises and legacies of money, and gave the residue of the personal estate to his wife, "after the payment of all my just debts, legacies and charges against my estate." The bill further set forth that the land described in the devise above quoted was subject to a mortgage by the testator to secure his promissory note for $1,666.67, with interest payable semi-annually; that the testator paid the interest on this debt as it became due, up to the time of his death, in January, 1864; that since his death no interest had been paid, that the legacies of money amounted to $4,300, and the assets, exclusive of specific devises and bequests, to about $5,541, and praying that the several defendants, who were the widow and legatees of the testator, might be decreed to interplead, and that it might be determined by whom the mortgage debt should be paid. These facts were all admitted by the several parties who appeared as defendants.

GRAY, J. The general rule of law, in the absence of any expressed intent, is that debts contracted by the testator, al-

though secured by mortgage, are to be paid out of his personal property to the exoneration of his real estate. Seaver v. Lewis, 14 Mass. 83; Hewes v. Dehon, 3 Gray, 205. In this case, the expressed intent accords with the general rule. The gift of the personal property to the widow is in terms postponed to the payment of all debts, legacies, and charges against the estate. In the devise of the homestead to the father, the use of the words restricting it to the testator's right, title and interest is accounted for by the outstanding right of dower in his mother, if not by a life estate in his aunts. The direction to sell other real estate has no tendency to charge this. The manifest intention of the testator was to devise to his father the homestead which had once been his, subject only to his wife's right of dower, and to the possession for life of the testator's maiden aunts. The personal property is therefore to be applied to the discharge of the mortgage.

Decree accordingly.

Where the Mortgage Preceded the Acquisition.

HOFF'S APPEAL.

24 Pa. St. 200. 1855.

WOODWARD, J. The testator devised to his wife, the appellant, for life, the house in which he dwelt on Chestnut street, together with the policy of insurance and furniture. When he purchased the house in 1847, there was a mortgage resting on it for $8,400, made by a former owner, and his will is silent in regard to the payment of the mortgage. The executors paid it off out of the personalty, and took an assignment; but the creditor and the Court of Common Pleas refused to allow them a credit for it on the ground that the widow took the estate *cum onere,* and that she must pay the mortgage. She appeals, and the question is whether the mortgage is chargeable on her estate or on the personalty.

* * * But how is it where the estate comes to the devisor encumbered by a mortgage made by a former owner? If it come by descent or devise, and the testator has done no act to make the debt his own, his devisee will take the estate *cum onere,* and

the executors are not chargeable with the mortgage; and the rule is the same even where the testator has purchased the estate, if he have had no connection, or contract, or communication with the mortgagee, and have done no act to show an intention to transfer the debt from the estate to himself. What dealings will have the effect to make the mortgage his own debt, have been debated in a great variety of cases, several of which counsel have cited in their paper-books. It seems that paying the mortgagee a higher rate of interest, and indemnifying the vendor against the mortgage, both which occurred in this case, are not such acts on the part of the purchaser as make him personally liable for the mortgage debt. Shafto v. Shafto, 2 Cox's P. W. 664; Woods v. Huntingford, 3 Ves. 128.

The court below ruled the question on this ground. The learned judge said, it must appear that he (the testator) has done some act by which he has made himself directly liable to the owner of the encumbrance; and then he ruled that the evidence submitted to the auditor was insufficient to shift the obligation from the real to the personal fund. We agree that some act must be shown, indicative of an intention to take the mortgage upon himself, and the court were, perhaps, right in setting aside the evidence of payment of an increased rate of interest, and certainly right in disregarding the declarations of the testator, made to persons having no interest in the subject; but they overlooked one important and decisive fact, which was in full proof before the auditor, to wit, that Hoff purchased not merely the equity of redemption in this house and lot, but the entire interest, and that the mortgage formed part of the price of the estate. The proof was that he bought of William Reynolds and wife for $13,900; that he paid $5,500, which, with this mortgage of Elmes to Harvey for $8,400, was "in full the consideration for the premises." The receipt of Reynolds, indorsed on his deed to Hoff, stipulates, moreover, that the said mortgage and the interest due, and to grow due, thereon are to be paid by the said John Hoff. * * *

If then Hoff, in his purchase of Reynolds, made himself liable to the mortgagee in any form of action, how can we hesitate to call the mortgage his debt? It is of no consequence that the mortgagee was not a party to the dealings between Hoff and Reynolds, for it is a rudimental principle, that a party may

sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not to himself. It is equally unimportant that the mortgagee's remedies against the land remained unimpaired. The question before us does not touch the specific lien of the mortgage, but the personal liability of the purchaser. He made himself liable to his vendor and to the mortgagee, and he retained purchase-money enough in his hands to indemnify himself. That money belonged to the mortgagee, and I hold he might have recovered it in assumpsit if not in covenant; but, not being paid in the lifetime of Hoff, his personal estate had the benefit of it, and it went into the hands of his executors for the payment, first of all, of his "lawful debts." He had no debt more lawful than this mortgage, and there is great precision in the equitable principle which devotes that money in the executor's hands to the satisfaction of this debt.

But that principle is applicable only when there is no controlling testamentary intention expressed. If it were deducible from the whole will, that the testator meant his widow should pay the mortgage out of her life estate, we should be obliged to say so—for the will is the law of his estate. But no such intention is manifest.

It is clear, however, beyond all doubt, that he meant the bulk of his personal estate should go to legatees in the form of pecuniary legacies; and it seems to be settled that the devisee of a mortgaged estate is not entitled to be exonerated out of personal estate specifically bequeathed. O'Neal v. Mead, 1 P. W. 693. And the same rule, it has been decided, extends to pecuniary legacies. Lutkins v. Lee, Cases in Time of Talbot, 3; Hamilton v. Morely, 2 Ves. Jr. 65. In Ruston v. Ruston, 2 D. 243, s. c. 2 Y. 54, we have a discussion of many of the principles I have adverted to; and, under a devise of mortgaged premises, it was held that the personal estate of the testator shall not go in ease of the mortgaged premises, so far as to defeat specific or ascertained pecuniary legacies, or any part thereof;—aliter of the legacies of the residuum.

On this ground the decree of the court can be sustained so far as the ascertained legacies under the will are concerned, but not as to the residuum, and the auditor's report shows that there will be residuum, though not of sufficient amount to

pay off the mortgage. Whatever there is must be applied to the mortgage in ease of the widow's life estate. The auditor distributed this under the 13th clause of the will; but so much of the decree as sustains this distribution must be reversed. If that clause be regarded as a bequest of additional legacies, it is so general and indefinite in terms as not to exempt the portion of the estate to which it applies from contribution to the mortgage. * * *

PART III

THE MORTGAGE DISCHARGE

CHAPTER XII.

PAYMENT OF THE DEBT.

What Constitutes Payment.

BROWN v. CORIELL.

50 N. J. Eq. 753, 26 Atl. 915. 1893.

* * *

REED, J. The undisputed facts in this case are these: One Peter V. Conover had married a daughter of one Stephen Brown, senior. Peter V. Conover was indebted to his wife. He was also indebted to his father-in-law, Stephen Brown, senior. While so indebted, he became a defendant in an action brought against him as surety on the bond of a third person. In view of this proceeding against him, he wished to secure his wife and father-in-law. This purpose was accomplished in this way: Conover gave a mortgage upon his real estate, to his father-in-law, for the amount of both debts. The father-in-law gave his own promissory note to Mrs. Conover for the amount of her claim against her husband. Mrs. Conover and her father died. When she died, she held the note mentioned. There was also found, after her death, another note for $1,000, made by Stephen Brown, senior, and payable to Mrs. Conover.

The bill in the present suit was filed by Peter V. Conover, as the administrator of his deceased wife, against the executors of Stephen Brown, senior. The bill prays that the mortgage made by Peter V. Conover to his father-in-law, Stephen Brown, senior, to secure the debts mentioned, may be decreed to be the property of the complainant, as administrator of his wife; also, that the two promissory notes made by Stephen Brown, senior, to his daughter, Mrs. Conover, may be surrendered to the com-

plainant, or that the amount due on such instruments, or payments received upon them may be decreed to be paid to the complainant; also, for a discovery of all notes, securities or obligations made by Stephen Brown, senior, to Ann E. Conover, which the defendants may have or know of.

Peter V. Conover having died, Abner S. Coriell was appointed administrator de bonis non of Ann E. Conover. * * *

We are of the opinion that the facts in this case show no equitable ground upon which this decree can stand. In the first place, the conclusion which we draw from the testimony is, that the transaction between the three persons, Peter V. Conover, his wife, Ann E. Conover, and Stephen Brown, senior, as a part of which the first-mentioned note was given, was a novation. The husband assumed the position of debtor to his father-in-law for the amount of his debt to his wife, and secured his father-in-law by mortgage. The father assumed the position of debtor to his daughter in consideration of this security given him by the husband. The wife and daughter accepted the note of the father and discharged her husband.

A legal obligation sprang into existence, from father to daughter. The note given by him to her was not a mere memorandum of the amount of her interest in the husband's mortgage. It was a legal debt, and its creation left in her father the legal title to the entire amount of the mortgage. The right to collect this note in a court of law, upon the death of the payee, passed to her husband as her administrator. The right to collect the amount of the mortgage from Conover, the husband, passed upon the death of Stephen Brown, senior, to his executors.

In this condition of affairs, no jurisdiction in a court of equity to seize upon the note and the mortgage existed. The right of the administrator to enforce the collection of the note, in an action at law, was complete. The authority to enforce the mortgage against Conover personally was a distinct affair. Even if the parties to the note and to the mortgage were identical, an insuperable objection to this decree would be presented, for it is perceived that the suit would amount to an attempt to redeem the mortgage by setting off this note against the mortgage. Now it is entirely settled in this state, that in a suit instituted to foreclose a mortgage, the defendant cannot set off

any demand he may have against the mortgage debt. This rule rests upon the ground that such a suit is not a personal action, but a proceeding in rem. * * *

It follows, as a matter of course, that such a set-off cannot be accomplished by a suit by the mortgagee to redeem by applying such an independent personal demand upon the mortgage.

Effect of Payment.

ROBINSON v. CROSS.

22 Conn. 171. 1852.

This was a bill in chancery, brought by Nathaniel P. Robinson, against John H. Cross and Benjamin Pomeroy. The facts stated in the bill were substantially as follows: The plaintiff and defendants were joint owners of three several tracts of land described therein, and seised of the same, as tenants in fee and in common,—the plaintiff owning two undivided fifths, and the defendants three undivided fifths thereof. On the 2d of March, 1849, the defendant, Cross, being the holder of certain notes, made by the plaintiff, and secured by a mortgage of the plaintiff's two-fifths of said land, brought his bill to the superior court, to foreclose the plaintiff's equity of redemption in the mortgaged premises. The prayer of the bill was granted, and the first Monday of December, 1849, was the time fixed for redeeming the premises. On the 17th of August, 1847, the plaintiff tendered and paid to Cross, the amount due him on said notes, according to the finding of the court. He then demanded of Cross, a release of the interest mortgaged to him by the plaintiff, which Cross refused to execute. * * *

The bill then prayed, that the defendants (if it should appear that said Cross had acquired any title at law, to said two-fifths of said premises) should be compelled to release and quit-claim the same to the plaintiff; and further, that partition should be made of said premises, between the plaintiff and defendants. * * * A demurrer to the bill was filed, at the term to which it was brought, on the ground, that it was multifarious; and also, that the matters set forth did not entitle the plaintiff to the relief sought.

STORRS, J. The plaintiff, by his bill, seeks first, a release

from the defendant Cross, of the interest in the land mortgaged to him by the plaintiff; secondly, a partition of the land between him and the defendants; and thirdly, an injunction restraining the defendants from dispossessing him of two-fifths of the land recovered by the latter, in the action of ejectment.

Upon the payment, by the plaintiff, of the sum decreed to be paid by him, on his mortgage to the defendant Cross, the latter became the bare trustee for the plaintiff, of the interest so mortgaged, which was two undivided fifths of the land; and it was his duty, when requested by the plaintiff, to release to the latter that interest. As nothing has since occurred, to change the relation between them, Cross still remains such trustee, and the same duty rests on him. The plaintiff is, therefore, entitled to a decree that Cross shall release to him such interest or to a decree, by which the legal title to the said two-fifths shall be directly vested in the plaintiff; which latter course we deem most advisable in this case. It is more simple and direct than the other, and has been more commonly taken, since the passing of the statute, giving that power to courts of equity, especially where the object is merely to transfer a legal title; and it would moreover, in this instance, expedite a partition of the land between the plaintiff and the defendants, to which, in our opinion, the former is entitled, and take away all color from the objection sometimes urged against that proceeding, on the ground of the parties having only an equitable title. Whichever of these modes of transfer is adopted, we see no good reason why such an objection ought to prevail in a court of equity, nor has any authority been adduced in support of it, in a case like the present, where the legal title of the whole land is in the defendants, but one of them is the bare trustee of a certain proportion of it for the plaintiff, and there are no circumstances which can produce any possible injustice or inconvenience to either of them, from a separation of their interests.

Application of Payments.

PENNSYLVANIA COAL CO. v. BLAKE.

85 N. Y. 226. 1881.

[Action of foreclosure. A question arose of the payment of certain notes. The defendant sent checks to the holder of the

notes for their payment. The holder objected. In a later interview Blake expressed his desire that the checks should be applied to the payment of such note; said Hoyt insisted that they ought to be applied upon the open account; said Blake did not then expressly assent to the application on the open account; Mr. Hoyt in the interview told Mr. Blake that if he insisted upon it, the checks should be applied upon the note, but if such application was made, the plaintiff's account with the firm would be closed, and payment of the matured open account expected, and that the plaintiff would no longer sell the firm coal on credit; with these expressions of their wishes and intentions as to the application of those checks, the interview terminated, neither expressly assenting to or refusing the wish of the other as to such application. No subsequent direction was given by Mr. Blake as to such application; he made no demand for the note; the firm continued to purchase coal of the plaintiff, and the plaintiff continued to deliver coal to them on credit and open account; soon after such interview the plaintiff gave the firm credit on its books for the amount of such checks as a payment on the open account, and delivered to the firm receipted vouchers showing such application; such note remained in the possession of the plaintiff uncalled for by said firm or said Blake; the plaintiff applied such checks to the open account and not upon the note; the plaintiff inferred the assent of said firm and of each member thereof to such application, and said firm and each member thereof did acquiesce therein.]

FOLGER, C. J. The second point made by the appellant is that one of the notes given on the extension was paid by the principals, and that the land is, by so much as the amount of that note, relieved from the lien of the mortgage. The difficulty in upholding this position is in the facts. Doubtless it was the purpose of the principals, when they went to the creditor with the checks, that the note should be paid. They never made the positive offer of them to the plaintiff to that end, in such way as that the plaintiff must take them for that explicit purpose or reject them. If the principals had insisted that the checks should be applied in payment of the notes, they would have been; but upon being given their option to have them thus applied and their credit on open account stopped, or applied

on open account and their credit thereon continued, they preferred the latter. The creditor recognized the right of the debtors to apply where they chose, and but exercised its right to urge and convince to a different application. The appellant, as surety, cannot take any advantage from what passed, for there was never an application to the notes insisted upon by the principals, or made in fact, or more than spoken of, and there was acquiescence by each of the principals in the course that was taken. The checks were not received as a payment; they were not left as a payment; they were left in abeyance, their ultimate application or return to be determined after further consideration. Moreover, by the subsequent agreement, made by the appellant, the note is treated as unpaid, and enters into, and the subject-matter thereof is part of, the joint debt of the principals, assumed by the appellant's husband, guaranteed by her and for the payment of which she pledged her separate estate. This agreement was made on good consideration, expressed in the instrument, and unless the agreements of parties who are married women are to be nothing more substantial than summer winds, she is estopped thereby. * * *

CHAPTER XIII.

TENDER OF PAYMENT.

What is a Proper Tender.

HARRIS v. JEX.

66 Barb. 232 (N. Y.). 1873.

By the Court, LEARNED, J. This is an action for the foreclosure of two mortgages executed in March, 1858, by the defendant Poillon. The defendant Poillon subsequently conveyed the premises to defendant Jex. The conveyance was expressly subject to the mortgages; but Jex did not personally assume them.

Jex and wife alone defended. The defense proved was that on the 1st day of October, 1870, and before the commencement of the action, the defendant Jex tendered the amount due them in legal tender notes.

Judgment was rendered in favor of the plaintiff, adjudging that he was entitled to the amount of the mortgages in gold coin, and directing a sale of the premises to raise enough to pay the gold coin and premium. Subsequently the plaintiff remitted that part of the judgment which gave the premium, and consented to a reduction thereof accordingly.

In the case of Kortright v. Cady (21 N. Y. 343) it was held that a tender of the money due on a mortgage discharged the lien; although the tender was not subsequently kept good. It is plain that this is a somewhat harsh principle; and it should not be pressed beyond its strict limits. It rests upon the familiar doctrine that the bond is the principal, and the mortgage is the collateral. Now while this is the legal principle, yet in modern times and in the common understanding of men, a contrary view prevails. It is the security on the land, and not the responsibility of the debtor, to which men look in taking mortgages. The facility of transferring real estate and mortgages results, frequently, in ignoring the original mortgagor, and treating the lien on the land as the only thing of real value. To hold, then,

that a mere tender, without actual payment, is a discharge of the lien may sometimes operate very unjustly.

It is important, then, to inquire who has the right to make a tender which shall have this very serious effect. * * *

Now certainly it would not be claimed that a mere stranger to the contract could make a tender of the debt to the creditor which would have any validity. And such a tender, that is, a tender made by a mere stranger, if refused, could not have the effect of "payment as to all things which are incidental and accessorial to the debt." It is important to keep this in view; that is, that a tender cannot be made by a mere stranger to the contract, so as to oblige the creditor to accept it.

What right then has the owner of the equity of redemption who has not assumed the debt personally? He has just what the name which designates him implies: The equity of redemption. That is, he has the right to redeem the land from the lien. But how is the land to be redeemed from the lien of the mortgage? Not, I suppose, by a mere tender which is not kept good, but by actual payment, or by bringing the money into court for the purpose of payment. The mere owner of the equity of redemption owes no debt. It cannot be said in respect to him as it is said in Kortright v. Cady, at p. 366, "The creditor by refusing to accept does not forfeit his right to the very thing tendered, but he does lose all collateral benefits and securities." For the creditor, if he refuses to take the money from the owner of the equity of redemption, cannot recover it from him. It is the redemption of a lien, not the payment of a debt, which his tender is to accomplish. There is no debt, at least from him, and therefore, as it seems to me, his mere tender does not discharge the mortgage lien. He has the right to redeem; but he must redeem by actual payment.

But there is a further consideration. The equity of redemption was in this case conveyed subject to the payment of the mortgages. The land was thereby made the primary fund for payment. The original debtor has become a quasi surety, having a right to insist on the enforcement of the debt out of the land. The holder of the equity of redemption cannot even dispute the validity of the mortgage. Freeman v. Auld, 44 N. Y. 50. The land, or so much as is necessary is (as it were) appropriated to the payment of the mortgages. If therefore, under such cir-

cumstances the owner of the equity of redemption were permitted to discharge the lien by a mere tender without payment, great injury would be done. For instance, in the present case, Jex took the land subject to the mortgages. It is reasonable to suppose that in so doing he deducted their amount from the value of the land agreed upon. The land then is primarily liable for the debt. That is, Poillon has a right to insist upon the collection of the debt first out of the land. Now if by a mere tender Jex has discharged the lien, then all the rights of the mortgagee seem to have gone. He cannot sue Jex; for Jex never assumed the debt. He cannot enforce the lien; for that, by the supposition, is discharged. He cannot sue Poillon; for by the discharge of the primary fund Poillon, who has become a quasi surety, must be released. The result is, that Jex retains the whole of the mortgage for which he has paid nothing, and the mortgagee loses his debt.

Unless the clearest principles of law require it, we ought not to work out such injustice.

There is another view of this case.

When the tender was made, the plaintiff refused it, for the reason that it was not made in gold.

At that time, as is well known, by the decision of the highest court in this country, such a contract as that in question was payable in gold. As the law therefore was then declared, the plaintiff was not obliged to accept the tender which was made. We should be very reluctant to visit on the plaintiff any injurious consequences for following the law as the Supreme Court of the United States has declared it to be.

If that tribunal has since laid down a different principle it would be very unjust in us to require that the plaintiff should have had sufficient foresight to know what the decisions would be in 1872. At the most, parties are only required to know the law as it exists at the time, not as it may be declared afterwards.

Judgment affirmed.

Tender On and After Law Day.

KORTRIGHT v. CADY.

21 N. Y. 343. 1860.

Action to foreclose a mortgage.

The defendant Cady was a subsequent grantee of the equity

of redemption. He averred in his answer, and proved on the trial, that, after the money secured by the mortgage had become due and the stipulated day for payment had passed, he tendered to the plaintiff the amount due for principal and interest. The plaintiff refused to receive it unless Cady would also pay certain taxes upon the mortgaged premises, which the plaintiff had discharged.

It was held that Cady was, for reasons unnecessary to be stated, under no obligation to pay the taxes, and the case stood upon the naked tender. Cady did not in his answer allege a readiness still to pay the mortgage debt, or that it was paid into court, nor did he offer to bring it into court; and it did not appear, from the finding of facts or otherwise, that he in any way kept the tender good.

The plaintiff had the usual judgment of foreclosure, and for a sale of the mortgaged premises. Upon appeal by the defendant Cady, this judgment was affirmed at General Term in the First District; whereupon he appealed to this Court.

COMSTOCK, C. J. After the suit was commenced to foreclose the mortgage, Cady, who had become the owner of the land, tendered the amount due, with the costs, which being refused, he set up the tender in his answer, in bar of the further maintenance of the action. The only question in the case is, whether a tender, made after a mortgage is due, by the owner of the lands mortgaged, discharges the lien.

Forty years ago this question was fully determined by the Supreme Court of this State, in the case of Jackson v. Crafts, 18 John. 110. Mr. Justice Woodworth, in delivering the opinion of the court, observed: "From the nature of the interest the mortgagee has, there is no necessity of a reconveyance by him to the mortgagor after the mortgage has been paid. When that is done, the mortgagee has no title remaining in him to convey, and consequently, by our laws, on payment of the money he is not deemed a trustee, holding the legal estate for the benefit of the mortgagor. The only question, then, is, whether tender and refusal are equivalent to payment." Having thus truly stated the relation between mortgagor and mortgagee, according to the law as it was then and has been ever since well settled in this State, he cited some of the early English authori-

ties, holding that a tender of the money due discharged the land from the lien. * * *

The proposition that a tender of the money due on a mortgage made at any time before a foreclosure, discharges the lien, is the logical result of premises which are admitted to be true. These are, that the mortgagor has the same right after as before a default to pay his debt, and so clear his estate from the incumbrance; and that payment being actually made, the lien thereby becomes extinct. We have, then, only to apply an admitted principle in the law of tender, which is, that tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the very thing tendered, but he does lose all collateral benefits or securities. 3 Johns. Cas. 243; 12 J. R. 274; 6 Wend. 22; 6 Cow. 728; Coggs v. Bernard, 2 Lord Ray. R. 916. Thus, after the tender of a money debt, followed by payment into court, interest and costs cannot be recovered. The instantaneous effect is to discharge any collateral lien, as a pledge of goods, or the right of distress. It is not denied that the same principle applies to a mortgage, if the tender be made at the very time when the money is due. If the creditor refuses, he justly loses his security. It is impossible to hold otherwise, although the tender be made afterwards, unless we also say that the mortgage, which was before a mere security, becomes a freehold estate by reason of the default. That this is not true has been sufficiently shown.

It is said that mortgagees will be put to great inconvenience if at any period, however distant from the time of maturity, they must know the amount of the debt and accept a tender on peril of losing their security. The force of this argument is not perceived. As a tender must be unqualified by any conditions, there can never be any good reason for not accepting the sum offered, whether it be offered when it is due or afterwards. By accepting the tender, the creditor loses nothing and incurs no hazard. If the sum be insufficient, the security remains. It is only by refusing, that any inconvenience can possibly arise. But, whatever may be the consequences of refusal, the creditor may justly charge them to his own folly.

The judgment of the Supreme Court must be reversed, and a new trial granted. * * *

CHAPTER XIV.

REDEMPTION.

Stipulations Concerning Redemption.

BATTY v. SNOOK.

5 Mich. 231. 1858.

[Bill to redeem. The contract of mortgage contained stipulations as follows:]

"And it is further hereby covenanted and agreed, by and between the parties hereto, that time is now, and shall be at all times, considered and deemed a material part of this contract. That, in case default shall be made in paying off and discharging said indenture of mortgage, as above agreed, on the 6th day of August, 1855, and in case default be made in the payment of said sum of two thousand dollars and interest, at the times and place in this agreement (233) specified; or in case default shall be made in fulfilling and performing any of the covenants and agreements herein contained and mentioned, to be kept, fulfilled, and performed on the part of the said party of the second part, and his legal representatives; then this agreement, and all preceding provisions hereof, shall be null and void, and no longer binding, at the option of the said party of the first part, his representatives and assigns, and all the payments which shall have been made hereon, or in pursuance hereof, absolutely and forever forfeited to the party of the first part." After a clause providing for re-entry in case of default, it goes on to say: "In case of such default, the said party of the second part shall be deemed as the tenant at will of the said party of the first part, at the yearly rent of ten dollars per annum; and after such default the party of the first part, his representatives and assigns, shall and may have and exercise all the powers, rights, and remedies provided by law to collect such rent or remove such tenant or tenants, the same as if the relation of landlord and tenant, hereby declared, were created

by an original and absolute lease for that sole purpose, on a specified rent of ten dollars annually, payable quarterly" * * *

MANNING, J. Once a mortgage always a mortgage, may be regarded as a maxim of the court. Equity is jealous of all contracts between mortgagor and mortgagee, by which the equity or redemption is to be shortened or cut off. The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud, and no undue influence brought to bear upon him for that purpose by the creditor. But it cannot be done by a contemporaneous or subsequent executory contract, by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such contract, without an abandonment by the court of those equitable principles it has ever acted on in relieving against penalties and forfeitures. What we now call a mortgage was at common law a conditional conveyance of the land, by which the title of the vendee was to terminate or become absolute on the performance or non-performance of the condition of the grant by the vendor at the day. When such conveyance was made to secure a debt, or for the performance of some other act by the vendor, equity took cognizance of the transaction, and declared the conveyance a security merely for the payment of the debt, or doing of the act, and on the performance thereof by the vendor, after the day had elapsed, and the estate had become absolute, would decree a reconveyance of the premises. To allow the equity of redemption to be cut off by a forfeiture of it in a separate contract, would be a revival of the common law doctrine, using for that purpose two instruments, instead of one, to effect the object. * * *

The decree of the court below, dismissing the complainant's bill with costs, must be reversed, and a decree be entered declaring the deed and contract one transaction, and to be a mortgage, and that complainant is entitled to redeem; and the transcript must be remitted to the court below for further proceedings.

Collateral Agreements Affecting Redemption.

UHLFELDER & CO. v. CARTER'S ADMR.

64 Ala. 527. 1879.

Bill for an accounting.

BRICKELL, C. J. As the case is presented, it is not necessary to inquire whether the stipulations for the future delivery of the cotton, contained in the mortgages, can be regarded as agreements for liquidated damages, or in the nature of a penalty, to be compensated, if there is a breach, only by the recovery of actual damages. The whole inquiry is resolved into the question, whether these stipulations are not mere devices to obtain a greater rate of interest, for the forbearance of an existing debt, than is lawful. The facts are, that the mortgagor was indebted to the mortgagees, in a sum stated in the mortgages at eight hundred dollars, but which is shown to have been much less in amount; the balance accruing upon dealings for several years. The mortgagor was a farmer of limited means, known to the mortgagees not to have the ability of raising more than fifteen or twenty bales of cotton in any one year, under the most favorable circumstances, and not of ability to purchase cotton to supply any deficiency between the quantity he could raise and that stipulated to be delivered. The mortgagees were retail merchants, not factors, or brokers, or warehousemen. Into the first mortgage is introduced a stipulation, that the mortgagor shall, on or before the first of the ensuing October, deliver to the mortgagees, for storage and sale, forty bales of cotton; and into the second mortgage a like stipulation is introduced, for the delivery of fifty-four bales of cotton. In the event of a failure to deliver, the mortgagor stipulated to pay, as liquidated damages, one month's storage, and a commission of two and a half per centum on the value of the cotton not delivered.

All contracts, express or implied, for the payment of money, or other thing, or for the performance of any act or duty, bear interest from the day such money or thing, estimating it at its money value, should have been paid, or such act, estimating the compensation therefor in money, performed. The lawful rate

of interest is eight per centum per annum; and any contract for a higher rate is usurious, and can be enforced for only the principal. Code of 1876, §§ 2088, 2092. Mortgages, like other contracts, may be impeached for usury, and, at law, the same consequences result, as would follow from taking or reserving it in any other form of contract. When, however, it becomes necessary for the mortgagor to resort to a court of equity for relief, in the absence of some peculiar fact or circumstance, the court will not interfere, unless he pays the principal and lawful interest. Relief from the usury is the extent to which he is entitled in good conscience. 1 Story's Eq. § 301; Br. Bank of Mobile v. Strother, 15 Ala. 51; Hunt v. Acre, 28 Ala. 580; Noble v. Walker, 32 Ala. 456; Eslava v. Elmore, 50 Ala. 587. * * *

The manifest distinction between these cases and the present is, that the creditors in making the loans, or in the forbearance of the present debt, added only a stipulation which would promote the business in which they were engaged, and which was usual in the course of such business. The loans or advances were to be invested in the purchase of the property, for the consignment of which they stipulated, or the property was to be sold and applied to the payment of the existing debt. In all of them, performance of the contract was stipulated, and the ability of the debtor to keep and perform was not questioned or doubted. Here, performance of the stipulation for the delivery of the cotton was not, and could not have been contemplated. The inability of the mortgagor to perform was known to the mortgagees, and the payment of the stipulated damages it was intended and expected they would receive, without ever being subjected to the labor, expense, and loss of time, which would have been incident to the storage and sale of the cotton, if it had been delivered. Nor was the storage and sale of cotton upon commission, the business in which they were engaged, and for the increase of which, it is fair to presume, they would employ their capital, whether it was in the form of existing debts, or of money in hand. When an agreement for a loan or advance of money, or the forbearance of a debt, is part of an entire contract, whether usury is intended is, in all cases, a question of fact. Smith v. Marion, 27 N. Y. 137. When the entire contract indicates that any one of its stipulations must operate to yield the creditor a profit for the loan or forbearance, and not compensa-

tion for loss or inconvenience, or for services rendered, or which it was contemplated he would render, it must be pronounced usurious. The mortgagees in the light of the facts, were, under the guise of a stipulation for the future delivery of cotton for storage and sale, but stipulating for the payment, in addition to lawful interest on the debt due them, of the additional profit of the usual charges for storage, and the commission on the sales. It not being contemplated that the cotton would be delivered, they could as well have stipulated for the payment of the precise sum of money to which the storage and commissions will amount, in addition to the lawful interest. All agreements of this kind must be zealously watched, or the statutes against usury will be nullified.

We are of the opinion there is no error in the record, and the decree will be affirmed.

Release of Equity of Redemption.

PEUGH v. DAVIS.

96 U. S. 332. 1877.

(Suit in equity to redeem. The property had been conveyed by absolute deed, but the conveyance was to secure a debt. Later, a further advance was made, on which plaintiff executed an instrument), * * * which recited that he had previously sold and conveyed to the defendant the squares in question; that the sale and conveyance were made with the assurance and promise of a good and indefeasible title in fee simple; and that the title was now disputed. It contained a general covenant warranting the title against all parties, and a special covenant to pay and refund to the defendant the costs and expenses, including the consideration of the deed, to which he might be subjected by reason of any claim or litigation on account of the premises. Accompanying this instrument, and bearing the same date, the complainant gave the defendant a receipt for $2,000, purporting to be in full for the purchase of the land. * * *

FIELD, J. It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the bor-

rower has in a court of equity a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates. Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities, will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity, and thus prevent the conditions from being enforced and the property sacrificed.

A subsequent release of the equity of redemption may, undoubtedly, be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. The transaction will, however, be closely scrutinized, so as to prevent any oppression of the debtor. Especially is this necessary, as was said on one occasion by this court, when the creditor has shown himself ready and skillful to take advantage of the necessities of the borrower. Russell v. Southard, supra. Without citing the authorities, it may be stated as conclusions from them that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding.

If, now, we apply these views to the question before us, it will not be difficult of solution. It is admitted that the deed of the complainant was executed as security for the loan obtained by him from the defendant. It is, therefore, to be treated as a mortgage, as much so as if it contained a condition that the estate should revert to the grantor upon payment of the loan. There is no satisfactory evidence that the equity of redemption was ever released. * * *

CHAPTER XV.

FORECLOSURE BY SUIT.

Jurisdiction to Foreclose.

SUMMERS v. BROMLEY.

28 Mich. 125. 1873.

GRAVES, J. This was an ordinary foreclosure cause on a mortgage made by defendant, Barton M. Bromley, to complainant's assignor, and dated March 9th, 1868. The only statement in the bill connecting the other defendants with the subject of the suit, or in any way implicating them, is one made under general rule ninety-one of the rules in chancery, and is in these terms: "And your orator further shows unto this court that Joseph Emerson, William Burbank, Jefferson Jones, John Barr, and Olive Bromley, have or claim some interest in the said mortgaged premises, or in some part thereof, as purchasers, mortgagees or otherwise, which interests, if any, have accrued subsequent to the lien of the said mortgage, and are subject thereto." None of the defendants, except two of those brought in under this particular allegation, namely, Emerson, and Olive Bromley, made defense. They put in separate answers, but their answers exhibited the same ground of defense, and it was, that when the mortgage was given, the defendant Olive was the absolute and exclusive owner of the premises, and that the defendant Emerson succeeded to her absolute and exclusive title, by conveyance from her. * * * The ultimate and substantial question was, in whom did the title reside. On the face of the papers it purported to reside in the mortgagor, Barton M. Bromley. The defense insisted that when the mortgage was given, it resided in Olive Bromley, who transferred to Emerson, in whom it has since continued to reside, and therefore that neither the mortgagor nor mortgagee possessed any title. The very gist of the defense was, the assertion of a title both hostile and paramount to that claimed for the mortgagor and mortgagee. On this the controversy was made to hinge. * * *

In the first place, it is not competent in a foreclosure suit, whatever the pleadings, to proceed to litigate and settle the right of a party who sets up a legal title which, if valid, is adverse and paramount to the title of both mortgagor and mortgagee. * * * Our legislation respecting foreclosure proceedings does not countenance such litigation. The passage in the statute (Comp. L., 5154), which declares that the commissioner's deed shall be an entire bar against each of the parties, must be construed with the preceding and other members of the section so as to harmonize therewith and with the general spirit of the law. It cannot rightly be held to mean that in case neither the mortgagor or mortgagee had any title, the commissioner's deed shall have the effect to give the purchaser one, by barring the true owner. A court of equity is not the appropriate tribunal, nor is a foreclosure suit a suitable proceeding, for the trial of claims to the legal title which are hostile and paramount to the interests and rights and titles of both mortgagor and mortgagee. Such a trial will neither fall in with the nature of the jurisdiction, or the genius or frame of the particular remedy.

It was not competent for the court below, and it is not competent for this Court, to decree upon and bind the right set up by Emerson, and no writ of assistance could be rightly awarded to turn him out of possession. The purchaser must be left to try the hostile title set up by Mrs. Bromley and Emerson, in ejectment, where a jury may pass upon the question raised by the charge of forgery. That question is a very proper one to be submitted to such a tribunal, while it is correctly considered as extremely unfit for a court of equity, unless the case is found to be a plain one. Barnesly v. Powell, 1 Ves. Sr., 120. * * *

The Foreclosure Sale.

NATIONAL SAVINGS BANK v. CRESWELL.

100 U. S. 630. 1880.

MILLER, J., delivered the opinion of the court:

Samuel P. Brown, being seised in fee of a large number of lots constituting the subdivision of a tract of land into the Town of Mount Pleasant, had a judgment rendered against him, March 3, 1870, in favor of one Jolly, for the sum of $4,694.05, in the

Supreme Court of the District of Columbia, and the lots being within the District, the judgment became from that day a lien on them. On the 20th day of June of that year, Mr. Brown borrowed of the Freedman's Savings and Trust Company the sum of $10,000 and executed to Daniel L. Eaton a deed of trust conveying a part of the lots owned by him in Mount Pleasant, as security for the repayment of the loan. Under this deed of trust the lots were sold and bought in for the Freedman's Bank, and they have resold several of them and guarantied the title to the purchasers.

A few months after the execution of the deed of trust above mentioned by Brown, he began to borrow money from the National Savings Bank, the appellant in this case, and gave deeds of trust on other lots in the same subdivision to secure the payment of these loans. In July, 1874, the National Savings Bank, fearing the loss of their security by the judgment against Brown of March 3, 1870, purchased that judgment, and ordered an execution to be issued on it, which was levied on the lots conveyed to Eaton for the benefit of the Freedman's Bank. That bank having passed into the control of Creswell and others, as commissioners appointed to wind up its affairs, they brought the present bill in chancery to release those lots from sale under that execution. * * *

The appellants argue that the subjection of the property covered by the lien of the judgment to its satisfaction, in the inverse order of its alienation, is not the prevailing rule in courts of equity, nor the rule of property in the District of Columbia.

The older cases cited for this proposition scarcely sustain it. In Sir William Harbert's Case, reported 3 Coke, 11, it was resolved that "If A be seised of three acres, and acknowledge a recognizance or statute, and enfeoff B of one acre and C of another acre, and the third descends to his heir, and if execution be sued out against the heir he shall not have contribution against the purchasers, for the heir sits in the seat of his ancestor." Among them is, also, the case of Lanoy v. Duke of Athol, 2 Atk., 444, in which Lord Hardwicke says: "Suppose a person who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first; the court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is

not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons." This seems to be a pretty clear statement of the rule adopted in many of the States of the Union at the present day, though based rather upon the principle applicable to marshalling assets, that he who has a right to resort to two funds, in one of which alone another party has a subsidiary lien, shall be compelled to exhaust the one to which the other cannot resort before coming upon the one in which they both have an interest, than on the ground now relied on in the courts of this country.

That ground is, that the first purchaser has a right to suppose that the part of the mortgaged property which he leaves with the mortgagor, will, in his hands, be first subjected to the payment of the mortgage he has made. To this Judge Story assents. But the principle goes further, and holds that when a second purchaser from the mortgagor buys either all or a part of the incumbered property which remains, he cannot place himself in a better position than his grantor, and revive the burden on the first purchaser's land, from which it had been wholly or partially relieved by its primary pressure on the land left by him in the hands of the mortgagor. * * *

That principle was stated by Chancellor Kent, with his usual force and clearness, in 1821, in the case of Clowes v. Dickenson, which has become the leading case on the subject in this country. 5 Johns. Ch., 235.

After referring to the case of Sir William Harbert, he says: "This case settles the question as between the vendor and purchaser, or the heirs of the vendor and purchaser, and if there be several purchasers in succession at different times, I apprehend in that case, also, there is no equality and no contribution as between these purchasers. Thus, for instance, if there be a judgment against a person owning at the time three acres of land, and he sells one acre to A, the two remaining acres are first chargeable in equity with the payment of the judgment debt, as we have already seen, whether the land be in the hands of the debtor himself or of his heirs. If he sells another acre to B, the remaining acre is then chargeable in the first instance with the debt as against B, as well as against A; and if it should prove insufficient, then the acre sold to B ought to supply the deficiency

in preference to the acre sold to A; because, when B purchased, he took his land chargeable with the debt in the hands of the debtor, in preference to the land already sold to A. In this respect we may say of him as it is said of the heir, he sits in the seat of his grantor, and must take it with all its equitable burdens; it cannot be in the power of the debtor, by the act of assigning or selling his remaining land, to throw the burden of the judgment or a ratable part of it back upon A." The doctrine and the reason upon which it is founded cannot be better stated than in this extract from the opinion.

We may, as an additional reason, suggest a principle often called into action in recent times in the courts, namely: that where one of two innocent persons must suffer a loss, it should fall on him who by reasonable diligence or care, could have protected himself, rather than on him who could not. In the case supposed, the second purchaser, at the time of his purchase, knowing that the land which he buys is subject to the incumbrance before that already sold, can exact of the vendor security or protection against the incumbrance, which it is out of the power of the first vendor to do at the time his risk is increased by the very act of the second purchaser. * * *

Decree affirmed.

Application of Proceeds.

SNOW v. WARWICK INSTITUTION FOR SAVINGS.

17 R. I. 66, 20 Atl. 94. 1890.

PER CURIAM. Bill in equity for an account and the payment of a surplus after a mortgage sale. * * *

The first question in this case is, what amount, if any, is the defendant bank, as mortgagee under the two mortgages mentioned in the bill, entitled to retain from the proceeds of the sales, under the powers therein, as compensation for its services as mortgagee? We do not think it is entitled to retain any amount. It was decided by this court in Allen v. Robbins, 7 R. I. 33, that a mortgagee is not entitled to compensation for services as such, and the same rule has been followed in cases decided since then, but not reported. The general rule is that a mortgagee, even after he has taken possession under his mort-

gage, is not entitled to compensation for his personal trouble in taking care of the estate, and renting it, although the mortgagor has agreed that he may have such compensation; the reason being that to allow such compensation would tend directly to facilitate usury and oppression. 2 Jones, Mortg. § 1132.

The second question is, what amount, if any, is the bank entitled to retain for counsel fees? We think it is entitled to be reimbursed for any expenses it has incurred for counsel fees which were necessary to enable it to execute the powers in the mortgages. In this view, we think the bank is entitled to retain the amount necessary for the payment of its lawyers' fees for preparing, or advising about the preparation of the advertisements of sale, and for drawing the conveyances to the purchasers after the sales. The sales were made after the death of the mortgagor, and before his estate had been settled, and before an administrator had been appointed upon his estate; and one question which arose in regard to the surplus was whether it should be paid over to the heirs instantly, or should be retained to meet demands which might be made upon it in the settlement of the estate. The bank procured the advice of counsel upon this question. We think it should be allowed so much as it has properly paid, or would be required to pay, for such advice. Beyond these matters it does not appear that it had any occasion for the services of a lawyer, and we do not think it should be allowed to retain for any lawyer's services rendered for the bank.

The third question is, what amount is the bank entitled to retain for its auctioneer's fees? It appears, that, before advertising the estate for sale, the bank had engaged a person to serve as auctioneer, and had the estates advertised under his name, but that, when the time for the sale arrived, said person was out of the state, and the sales were made, in fact, by other auctioneers, who were employed for the purpose by the person engaged as aforesaid. These auctioneers sold the estates in pursuance of a special contract, each for $10. The bank claims to retain full auctioneer's fees for the person engaged by it, amounting to $334.05; contending that the auctioneers who actually made the sales, are to be treated as the employes or the deputies of such person. We do not think this view is tenable. If the auctioneer engaged by the bank did not attend to make the sales, he committed a breach of his contract, and is not en-

titled to compensation. The auctioneers who actually made the sales must be regarded as acting in their own characters, the auctioneer who employed them not being present, since it is not in the power of an auctioneer to appoint a deputy, or to perform his services as auctioneer by an agent or employe, unless he is himself present, supervising the sale. Our opinion is that the bank is only entitled to retain $20 paid to the auctioneers who actually performed the services.

The fourth question is, what amount is the bank entitled to retain for advertising and posters? We can see no reason why it should not retain the full amount of the expense incurred therefor.

The fifth question is whether the bank shall pay the surplus, after the deductions allowed, to the heirs of the mortgagor, or shall retain it until the appointment of an administrator. As we have already stated, the estates were sold after the death of the mortgagor, and consequently after the equity of redemption had vested in his heirs as real estate. The heirs are clearly entitled to the surplus, therefore, unless the surplus, or some portion of it, is needed to pay the debts of the deceased mortgagor. The mortgagor died 17 months ago, and, as no administration has been taken out, it is fair to presume that the surplus will not be required for that purpose. At any rate, we think the bank has waited as long as it can be reasonably required to wait for the appointment of an administrator before paying the surplus to the heirs. We decide that it should pay it to the heirs. * * *

The Personal Judgment.

HULBERT v. CLARK.

57 Hun 558 (N. Y.), 11 N. Y. Supp. 417. 1890.

Action to foreclose a mortgage.

DWIGHT, P. J. The plea of the statute of limitations which was interposed by an amendment to the answer allowed on the trial, presents the simple question whether an action to foreclose a mortgage of real estate for the collection of a simple contract debt, which the mortgage was given to secure, is barred by the six-years statute of limitations. * * * The argument of

counsel for the defendants is based largely upon the assumption that the statute of limitations raises the presumption of payment of the debt or obligation within the time prescribed by the limitation. But this assumption is erroneous. There is only one case in which by our statute a presumption of payment is created by the lapse of time, and that is the case of a judgment or decree for the payment of money. Code Civil Proc. 376. In all other cases the effect of the statute is only to limit the time within which an action may be commenced. Id. 381, 382, et seq. In all these cases the debt or obligation remains unaffected, except as to the remedy for its collection or enforcement. If a party has two remedies for the collection of the same debt, he may pursue either within the time limited by the statute for its pursuit. In this case, the debt evidenced by the notes in question was not paid or satisfied by the lapse of six years from the time when it became due; the statute only forbade, after that time, an action on the notes for its recovery. But the same debt was also secured by the mortgage, upon which an action might be maintained at any time within twenty years; and that was the action brought by the plaintiffs. The plea of the statute of limitations was therefore properly overruled, and a judgment ordered for a foreclosure of the mortgage.

But the same consideration above presented shows that in one respect the judgment entered, and from which the appeal was taken, was the one to which the plaintiffs were not entitled, and which was not warranted by the findings of the referee. The action being on the mortgage, and not on the notes, was solely an action in rem, and no personal judgment could be had therein against either of the defendants. The judgment as entered directs that the defendant William B. Clark pay to the plaintiffs whatever deficiency may arise on the sale of the mortgaged premises. The judgment should be modified by striking out the provision mentioned, and, as modified, affirmed, without costs of this appeal to either party.

All concur.

CHAPTER XVI.

POWER OF SALE MORTGAGES.

Reasons for Powers of Sale. Who May Purchase.

VERY v. RUSSELL.

65 N. H. 646, 23 Atl. 522. 1874.

Action of trespass on agreed statement of facts. Plaintiff gave a mortgage with a power of sale. The mortgagee sold under the power, and bought in for himself through an agent. The mortgagee then conveyed to defendant, who went on the land and cut timber, for which this suit was brought.

Judgment for defendant.

FOSTER, J. The defendant claims title to the premises and property, which are the subject of the alleged trespass, by virtue of a valid execution of the power of sale contained in the plaintiff's mortgage to Cole. The validity of such powers is very generally, if not universally, recognized and declared by the text-writers on both sides of the Atlantic, who adduce abundant authorities in support of their propositions. The doctrine seems to rest upon a principle no less broad and fundamental than the right of parties to make for themselves such legal contracts as they choose. * * * But we are unable to see upon what ground, in the absence of legislative prohibition, the court can put a restriction upon the freedom of the citizen to contract for the sale of his land upon terms and in a mode stipulated in a mortgage, any more than upon his liberty to contract for its sale in any other way, or by stipulations contained in any other instrument. The validity of such a power has been very generally affirmed in the other states of the Union. It is recognized in every other New England state, although in no one of them is it declared by express statute. * * * Doubtless the power ought not to be recognized in any case unless it is conveyed by an express grant, and in clear and explicit language; and its execution should be jealously watched, and declared void for the slightest unfairness or excess, or for anything that pre-

vents competition. But the legal power of the parties to make such a contract must, we think, be upheld; and when, in carrying it out, the above essential conditions are fairly fulfilled, the sale must be held to divest the mortgagee of all his rights in the premises.

Was the execution of the power in this case legal and effectual? We think not, for the reason that the mortgagee, through Shaw, was the purchaser at the sale. The cases are numerous where it is held that if a person intrusted to sell property shall, directly or indirectly, become himself the purchaser, the sale is, ipso facto, so far a fraud that any one interested in it as cestui que trust may avoid it at his election. It is said that if the mortgage contains a power of sale the mortgagee becomes a quasi trustee for the mortgagor, and he cannot purchase, or, if he does, he becomes a constructive trustee. Perry, Trusts, 199; 1 Washb. Real Prop. 500; Snell, Eq. 379. Such seems to be the weight of authority, though it has been held in some cases that such sale can only be impeached by showing actual fraud. * * * We think it would be dangerous, even when no actual fraud is shown, to hold the sale valid in such cases, and that the safer course is to discourage every appearance or suspicion of fraud, by adopting strictly the rule as above expressed, that a purchase of the mortgaged estate by the mortgagee must, as to the mortgagor, be regarded as ipso facto fraudulent and void. The defendant claims that, in case the sale should be held invalid as between mortgagor and mortgagee, his situation then becomes that of a mortgagee in possession, and therefore that this action for trespass will not be against him for acts done on the premises while so in possession. The position cannot be sustained. The quitclaim deed from Cole to Shaw passed no interest in the mortgage or in the land, because there was no transfer of the debt secured by the mortgage.

There is another ground, however, upon which the defendant's title must be upheld. So far as the case shows, he stands in the position of an innocent purchaser for value, with no notice or knowledge of the fault in the sale, and nothing to put him upon inquiry. That being so, it is a well and long established rule that he is to be protected in his title according to the legal interpretation of the instrument of conveyance by which he holds. * * * The purchase money derived from the auction sale is an ex-

tinguishment pro tanto of the plaintiff's indebtedness to Cole. If the property sold for its fair value, and the sale was made without actual fraud, the plaintiff has not been wronged. If she has been in fact defrauded by Cole, she has her remedy against him in an action for the damages occasioned by the fraud; and, even if she should fail in that remedy by reason of the inability of Cole to respond in damages, it would seem that she should suffer the loss, rather than the defendant, who is equally innocent, because, by granting to Cole the right to sell, she put it in his power to work the injury through the execution of that power.

Case discharged.

Who May Exercise the Power.

MASLIN v. MARSHALL.

94 Md. 480, 51 Atl. 85. 1902.

Application of John W. Marshall, as assignee, for the ratification of the sale of real estate under a power of sale contained in a mortgage. From an order overruling exceptions to the confirmation of such sale, filed by Frank N. Maslin, he appeals.

Affirmed. * * *

SCHMUCKER, J. The mortgage contained a power of sale in the usual form to "the said William F. Frick, Charles F. Mayer, and Mary E. Garrett, trustees, as aforesaid, or the survivors or survivor of them, or their successors or successor in said trust," authorizing them to sell the mortgaged property in case of default in payment of the mortgage debt. A default having occurred, the appellee made sale of the mortgaged premises, professing to act in so doing under the power of sale contained in the mortgage, and reported the sale to circuit court No. 2 for ratification, when the appellant, who was the purchaser at the sale, excepted to its ratification. The court, by its order of October 3, 1901, overruled the exceptions, and finally ratified the sale, whereupon the present appeal was taken from that order. * * *

Furthermore, this court has repeatedly held that a power of sale conferred by a mortgage upon the mortgagee, being intended to afford him a means of promptly collecting his debt, is a power

coupled with an interest and is therefore appurtenant to the estate, and passes with it as part of the mortgage security to an assignee of the mortgage, or even of the mortgage debt. Berry v. Skinner, 30 Md. 567; Bill v. Satterfield, 34 Md. 53; Mackubin v. Boarman, 54 Md. 387; Barrick v. Horner, 78 Md. 255, 27 Atl. 1111, 44 Am. St. Rep. 283. When a power is appurtenant to an estate, it passes to the assignee of the estate, not because he was designated in the grant of the power, nor because of special confidence reposed in him by such grantor as a suitable person to execute the power. It passes to him as an incident of the estate conveyed to him just as a right of way or other easement or appurtenance used or enjoyed therewith would pass to him. No delectus personae by the grantor is involved in the transmission of such a power, as is the case with a power in gross, or a collateral one, which can be exercised only by the persons designated in the instrument creating the power. The absence of the word "assigns" from the clause of the mortgage granting the power of sale in the present case is unimportant for another reason. No words of inheritance are now necessary to pass an estate in fee to the grantee in a deed, nor is the word "assigns," or any similar expression, requisite to pass to a mortgagee an assignable interest in the mortgaged property, and by parity of reasoning the presence of any such words in a mortgage power of sale should not be required to make it transmissible as an incident of the mortgagee's estate. * * * Nor do we think that the power of sale in this case was destroyed because the mortgagee's estate was for a time vested in the safe deposit and trust company. * * * The inability of the safe deposit company to execute the power of sale did not arise from any defect in the power, but from the infirmity of the company itself. The original donees of the power were natural persons, who were unaffected by any disability, and it was therefore validly created as an incident of the mortgage estate; and, as we have already said, it formed part of the security itself, and passed with the estate to the successive assignees thereof. It must, upon principle, be held to have been exercisable by all such assignees, except in so far as they may, by reason of their own disability, have been incapable of executing it. The order appealed from will be affirmed.

Order affirmed, with costs.

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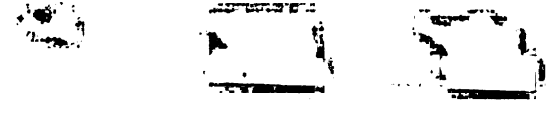

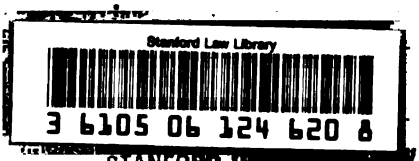

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